

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

MARILYN KUNELIUS,

Plaintiff,

v.

TOWN OF STOW, et al.

Defendants.

CIVIL ACTION NO. 05-11697-GAO

**MEMORANDUM OF LAW IN SUPPORT OF THE TRUST FOR PUBLIC LAND'S  
MOTION FOR A PROTECTIVE ORDER**

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, defendant the Trust for Public Land ("TPL") hereby moves for a protective order prohibiting plaintiff Marilyn Kunelius ("Kunelius") from examining TPL's Rule 30(b)(6) deponent on issues that are overbroad and seek patently irrelevant information not reasonably calculated to lead to the discovery of admissible evidence regarding the narrow questions at issue in this matter.

**BACKGROUND**

**The Claims and Defenses in the Lawsuit**

The issues in this case are narrow. This lawsuit arises out of the proposed sale of land in Stow, Massachusetts owned by Kunelius (the "Property"). Kunelius entered into a Purchase and Sale Agreement ("Agreement" or "P&S") with Cohousing Resources, LLC, a land developer, in October 2002. Because Kunelius had previously elected to have the Property valued and assessed under Chapter 61 of the Massachusetts General Laws as forest land, resulting in tax savings to Kunelius, Kunelius was bound to offer the Town of Stow a right of first refusal to meet the bona fide offer. The Town voted to assign its statutory right of first refusal to TPL, a

nonprofit conservation organization, as provided under the terms of Chapter 61. TPL accepted that assignment and stepped into the shoes of the Buyer in the Agreement. Ultimately, however, TPL was unable to complete the purchase as intended and failed to close on the Property.

Kunelius brought a complaint against TPL, the Town of Stow, and Craig A. MacDonnell, the Massachusetts State Director of TPL, alleging that TPL's failure under the Agreement violated state and federal law and seeking, *inter alia*, specific performance of the Agreement along with monetary damages, interest, costs, and attorney's fees. Specifically, Kunelius alleges breach of contract, violations of Mass. Gen. Laws c. 93A, intentional interference with a contractual relationship, violation of 42 U.S.C. §§ 1983, 1988, fraud and misrepresentation. Complaint at 14-22.<sup>1</sup> Defendants argue that Kunelius has already received the only damages to which she is entitled under any of these theories – the liquidated damages explicitly contracted for in the P&S – and that she is entitled to no more under the plain terms of the contract. The essential question in this case, thus, is whether Kunelius is limited to the liquidated damages provided for in the P&S. Plaintiff's attempt now to conduct discovery into facts well outside of this inquiry is no more than a red herring designed to distract from the infirmity of her claims.

**Plaintiff's Notice of Rule 30(b)(6) Deposition of TPL**

On or about February 20, 2007, Kunelius served a Notice of Rule 30(b)(6) Deposition of Defendant The Trust for Public Land ("Deposition Notice"). A copy of the Deposition Notice is attached hereto as Exhibit A. The Deposition Notice seeks testimony into twelve subject matters listed on Schedule A to the Deposition Notice. This Deposition Notice was sent *after* plaintiff's counsel had already deposed TPL's Massachusetts State Director, Craig A. MacDonnell, for a full day on February 8, 2007 on the details of the transaction.

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<sup>1</sup> The Court has already dismissed one count of Kunelius' complaint – that of intentional infliction of emotional distress. *See* Memorandum and Order, dated May 17, 2006.

The Deposition Notice called for a deposition on March 12, 2007. On February 26, 2007, counsel conferred and counsel for TPL informed Kunelius' counsel that counsel for TPL was not available on March 12, 2007 and offered to provide other available dates. In this same conference, Kunelius' counsel stated that he would be willing to allow TPL to adopt the testimony of Mr. MacDonnell as its own for purposes of a Rule 30(b)(6) deposition. Because Mr. MacDonnell was TPL's project manager for the proposed purchase of the Property, he is the representative of TPL that has the most personal knowledge concerning the events surrounding the proposed purchase of the Property.

Counsel for TPL sent a letter by facsimile and first-class mail to Kunelius' counsel on March 5, 2007 outlining TPL's response to the Deposition Notice ("March 5 Letter"). A copy of this letter is attached as Exhibit B. In that letter, TPL offered to adopt Mr. MacDonnell's prior testimony as its own for all topics in the Deposition Notice that were specific to the proposed purchase of the property. TPL offered to produce a witness on relevant areas of inquiry that were not project-specific and had not been addressed in Mr. MacDonnell's deposition. Finally, TPL objected to the production of a witness on two topics on the ground that the testimony sought was overbroad and irrelevant. The testimony in dispute centers largely around TPL's financial status, including TPL's available lines of credit and bank accounts. Counsel for Kunelius sent a letter to TPL's counsel by facsimile on March 7, 2007 outlining the areas of disagreement between counsel for TPL and Kunelius ("March 7 Letter"). A copy of Kunelius' letter is attached as Exhibit C. The parties have since re-scheduled the deposition for March 22, 2007.

**Disputed Topics in the Deposition Notice**

There are four areas of inquiry that are the subject of this motion.<sup>2</sup> These areas of inquiry fall into two categories: (1) topics on which TPL has already provided testimony through the deposition of Mr. MacDonnell and for which TPL is willing to adopt Mr. MacDonnell's individual testimony as its own; and (2) topics on which TPL objects to the provision of testimony because the subject matter exceeds the discovery permissible under Fed. R. Civ. P. 26.

The first category of topics on which TPL has already provided testimony through an individual that it has offered to adopt includes two disputed topics, Topics 1 and 11 on Schedule A to the Deposition Notice. Topic 1 calls for testimony on "The sources of funding for the purchase of the Plaintiff's Property as a result of TPL's exercise of the right of first refusal." Exhibit A, at 5. Topic 11 seeks testimony on "Negotiations, instructions, and assistance to the Friends of Red Acre's effort to raise funds in connection with the Plaintiff's Property." *Id.* at 6.

The second category of overbroad and irrelevant topics includes two disputed topics, Topics 2 and 3. Topic 2 calls for testimony on "TPL's financial status from January 1, 2003 through December 31, 2003 including but not limited to TPL's available cash needs, other liquidate asserts [sic], lines of credit in place or available to TPL upon application, lines of credit available to TPL where such lines of credit were supplied by banks or financial institutions connected to or in any way related to TPL's officer [sic], directors, Board of Advisors or any other such designation." Exhibit A, at 5. Topic 3 calls for testimony on "TPL's bookkeeping, applications, withdrawal histories, repayment histories, notices of default, and disbursement

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<sup>2</sup> The parties have been able to reach agreement on the remaining topics in the Deposition Notice. Specifically, TPL and Kunelius have agreed that TPL will produce a witness on Topics 6, 7, 9, and 10. Further, TPL and Kunelius have agreed that TPL will adopt Mr. MacDonnell's testimony as its own on Topics 4, 5, 8, and 12, and that TPL will not have to produce a witness on those topics.

schedules with regard to a line(s) of credit with Wainwright Bank, or any other bank, financial institution, private lender, including brokerage firms or any other source, for any amount of money or any other loan or lending vehicle in place or applied for from 2002 through 2007.” *Id.*

### **Argument**

**A. Kunelius Should be Barred From Obtaining Cumulative Discovery on Topics on Which She Has Already Had Ample Opportunity to Obtain Discovery.**

Kunelius should be prohibited from requiring TPL to produce a witness on Topics 1 and 11 in the Deposition Notice because they are areas into which Kunelius has already inquired, had ample opportunity to inquire, and on which TPL has offered to adopt Mr. MacDonnell’s testimony as its own as invited by Kunelius’ own counsel. Rule 26(b)(2) prohibits discovery that is “unreasonably cumulative or duplicative,” as well as discovery on which “the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.” For both of these reasons, a protective order should be granted prohibiting Kunelius from inquiring into Topics 1 and 11.

The discovery sought has already been covered extensively in the deposition of Mr. MacDonnell, which TPL has offered to adopt as its own. Kunelius’ counsel spent a full day comprehensively examining Mr. MacDonnell on all issues related to the purchase of the Property. The deposition began at 10:01 a.m. and did not conclude until 5:52 p.m., spanning the full seven hours permitted under Fed. R. Civ. P. 26(d)(2). In that deposition, Kunelius’ counsel inquired at length into both Topics 1 and 11. Indeed, the vast majority of the deposition was spent inquiring into Topic 1, TPL’s “sources of funding” for the purchase of the Property. *See, e.g.,* Deposition of Craig A. MacDonnell (attached hereto as Exhibit D) at 54-57, 60-61, 70, 75, 78-80, 85, 94-96, 99-100, 104, 107-17, 121-22, 137-40, 142-44, 187-88, 220-21, 223, 225-27, 232, 235-39.

Kunelius' assertion in the March 7 Letter that Topic 1 was not answered by Mr. MacDonnell because "MacDonnell claimed to know nothing about the line of credit" is patently false. *See* Exhibit C. Mr. MacDonnell was questioned at length by Kunelius' counsel about the availability of a line of credit from Wainwright Bank and Mr. MacDonnell responded to those questions with specific facts about the line of credit. Specifically, Mr. MacDonnell testified that (1) TPL had a standing line of credit with Wainwright Bank, *id.* at 108; (2) no application was required for the line of credit, *id.* at 109; (3) this line of credit was available to the New England Regional Office of TPL, *id.* at 115; (4) there was some discussion about using this line of credit for the Kunelius Property, *id.* at 108; (5) TPL could use that line of credit if necessary and subject to due diligence and approval, *id.* at 111; (6) use of the line of credit was subject to due diligence and approval by TPL's Board of Directors, *id.* at 113; (7) a decision was made by TPL not to use the line of credit, *id.* at 114; (8) Mr. MacDonnell had no reason to believe the line of credit was in default, *id.* at 114; (9) he was not aware of TPL being in default on any lines of credit or other banking obligations, *id.* at 120; (10) he was not aware of ever utilizing the Wainwright line of credit on any of his projects at TPL, *id.* at 126; and (11) he is aware that TPL has one other line of credit with Sun Trust, *id.* at 127.

Furthermore, Mr. MacDonnell testified concerning the other topic in dispute, Topic 11, the fundraising efforts of the Friends of Red Acre ("FORA"). Specifically, Mr. MacDonnell testified that (1) he approached FORA for fundraising purposes, *id.* at 213; (2) he did not tell FORA not to fundraise because TPL did not want to go forward with the project, *id.* at 213-14; (3) toward the end of the project, TPL discussed with FORA the fact that the project was falling apart and that it made sense to "fold our tent," *id.* at 214; (4) TPL and FORA had discussions about "how to keep the project together, including where was the money going to come from, is

it borrowed, is it privately fund-raised,” *id.* at 215; (5) TPL and FORA had “many, many conversations along these lines,” *id.* at 215; (6) TPL and FORA were frustrated with the private fund-raising, *id.* at 216; (7) FORA raised money for the purposes of making deposits for the purchase, *id.* at 219; and (8) TPL and FORA had discussions about whether “any dollars would materialize that could pay off any potential amount,” *id.* at 219.

Having had the opportunity to question Mr. MacDonnell at length regarding these topics, Kunelius should be barred from any additional, duplicative testimony. Rule 26(b)(2) prohibits precisely the testimony that Kunelius seeks here:

The frequency or extent of the use of the discovery methods otherwise permitted under these rules and by any local rule *shall* be limited by the court if it determines that: (i) the discovery sought is ***unreasonably cumulative or duplicative*** . . . ; (ii) the party seeking discovery ***had amply opportunity by discovery in the action to obtain the information sought***; or (iii) the ***burden of expense of the proposed discovery outweighs its likely benefit***, taking into account the needs of the case, . . . the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2) (emphasis added). Kunelius’ request violates all three sub-parts of Rule 26(b)(2). First, it is unreasonably cumulative and duplicative of Mr. MacDonnell’s deposition testimony. Mr. MacDonnell testified at length concerning these issues. If Kunelius had noticed the Rule 30(b)(6) deposition before or contemporaneously with the individual deposition notice to Mr. MacDonnell, Mr. MacDonnell would very likely have been the designee for the Rule 30(b)(6) deposition. Second, Kunelius has already had ample opportunity to obtain this information from TPL. Kunelius deposed Mr. MacDonnell, the Massachusetts State Director of TPL and the project manager for TPL who was responsible for the Kunelius project, for a full day. To the extent Kunelius had questions about Topics 1 and 11, the deposition of Mr. MacDonnell was the time to ask them. Finally, the burden of producing a witness on these

topics outweighs its likely benefit where Kunelius already has ample testimony of TPL on these topics. To produce a witness on these topics would require TPL to produce a witness for yet another day of questioning on topics that Mr. MacDonnell has already devoted an entire day to answering.

In a case examining the exact same circumstances, the court explicitly refused to allow the type of cumulative discovery Kunelius seeks here. In *Novartis Pharmaceuticals Corp. v. Abbott Laboratories*, 203 F.R.D. 159, 163 (D. Del. 2001), the court refused to allow a Rule 30(b)(6) deposition where the company had offered to be bound by the earlier testimony of an individual who was the person most knowledgeable on the subject areas and would have been the Rule 30(b)(6) designee. In *Novartis*, the court held that another deposition “would be cumulative to the testimony already procured” and denied a motion to compel a Rule 30(b)(6) deposition on the same topics. *Id.* Similarly, forcing TPL to produce a witness on Topics 1 and 11 would be cumulative, especially where, as here, Kunelius has already had ample opportunity to obtain the information sought, Mr. MacDonnell would have been the Rule 30(b)(6) designee on these topics, and TPL has offered to adopt Mr. MacDonnell’s testimony as its own. Accordingly, the Court should enter a protective order prohibiting further testimony into Topics 1 and 11.

**B. Kunelius Should Be Barred From Seeking Testimony on Topics That are Overbroad and Irrelevant to the Claims and Defenses in the Action.**

Kunelius should be prohibited from inquiring into Topics 2 and 3 because they are overbroad and concern issues that are wholly outside of the realm of possible relevance to the claims and defenses in this litigation. Under Fed. R. Civ. P. 26(b)(1), the scope of permissible discovery is limited to “any matter . . . that is relevant to the claim or defense of any party.” The Court has discretion to limit discovery where, as here, the discovery sought falls wholly outside



the claims and defenses in the case. *Blount Int'l, Ltd. v. Schuylkill Energy Resources Inc.*, 124 F.R.D. 523, 527 (D. Mass. 1989) (granting protective order where discovery requests went beyond the claims and defenses in the case). A protective order should issue to bar inquiry into Topics 2 and 3 because Kunelius is seeking discovery on subjects that are neither relevant to the issues raised in the litigation nor calculated to lead to the discovery of relevant and admissible evidence. *See United States v. Nordberg*, 1996 WL 170119, at \*3, No. Civ. A. 93-12681 (D. Mass. April 8, 1996) (denying motion to compel depositions of witnesses because the testimony would be irrelevant to the issue in the case); *Blount Int'l*, 124 F.R.D. at 527 (limiting discovery to extant claims and defenses and prohibiting discovery of information falling outside those boundaries); *Flynn v. Church of Scientology Int'l*, 116 F.R.D. 1, 3 (D. Mass. 1986) (“It is axiomatic that Fed. R. Civ. P. 26(b) provides that only relevant matter may be the subject of discovery.”). The question before the Court in this litigation is simply whether Kunelius is entitled solely to her liquidated damages under the Agreement or whether she is entitled, as she claims, to more. Detailed facts concerning TPL’s financial status and line of credit with Wainwright Bank will not aid in this inquiry.

Whether or not TPL had sources from which it could have obtained funds to close on the Property is immaterial to the question of damages in the event of a failure to perform under the Agreement. *See, e.g., Perroncello v. Donahue*, 448 Mass. 199, 203-204 (2007) (stating that liquidated damages clauses “*will be enforced* so long as ‘at the time the agreement was made, potential damages were difficult to determine and the clause was a reasonable forecast of damages expected to occur in the event of a breach’”) (emphasis added) (quoting *Kelly v. Marx*, 428 Mass. 877, 878 (1999)). Nothing in the case law suggests that a liquidated damages clause will only be enforced where there is a showing of a lack of funds. Indeed, in rejecting the

“second look” doctrine, which previously allowed courts to consider the enforceability of a liquidated damages clause at the time of the breach, the Supreme Judicial Court implicitly held that evidence of the financial capability of the buyer at time of default is not only irrelevant but should not even be admissible. *See Kelly v. Marx*, 428 Mass. 877, 881 (1999) (rejecting “second look” approach because, among other things, it “undermines the peace of mind and certainty of result the parties sought when they contracted for liquidated damages”) (internal citation and quotation omitted). TPL’s decision not to resort to the use of its own funds or available lines of credit to close on the Property was based on its inability to raise outside funds sufficient for TPL to accomplish its mission of recovering its investment and transferring the Property to a long-term steward who could protect and conserve the land. This decision has nothing to do with Kunelius’ rights upon TPL’s failure to close.<sup>3</sup>

Indeed, counsel for TPL has offered to determine whether TPL could simply stipulate to the availability of a line of credit at the time of the closing in an amount sufficient to cover the purchase price in lieu of a deposition on these topics. However, this offer was rejected wholesale by Kunelius. The only plausible explanation for Kunelius’ outright rejection of this offer is Kunelius’ attempt to embark on a fishing expedition into detailed nuances of TPL’s financial status – information to which Kunelius is not entitled. Moreover, Kunelius has access to TPL’s publicly-available annual reports containing financial information, as evidenced by her attachment of one of those reports to her Complaint. *See* Complaint, Ex. 10. Because Topics 2

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<sup>3</sup> Moreover, Kunelius’ claim that the door has been “opened” concerning these issues because “MacDonnell claimed that he knows nothing about the financing” is belied by the facts. Exhibit C. As outlined in detail above, Mr. MacDonnell answered questions at length about the available line of credit.

and 3 seek testimony on plainly irrelevant matters, the Court should enter a protective order prohibiting inquiry into these areas.<sup>4</sup>

### **Conclusion**

This is not a motion in which the requested discovery covers topics that are at least tenuously connected to the issues in the litigation – here, they are entirely unrelated, overbroad in scope and time, burdensome, harassing, and not propounded in good faith in pursuit of legitimate discovery needs. Accordingly, TPL respectfully requests that this Court issue a protective order barring Kunelius from inquiring into Topics 1, 2, 3, and 11 in the Deposition Notice, and grant such other relief as the Court deems just and proper.

### **Request for Oral Argument**

TPL believes that oral argument may assist the Court and requests that the Court grant a hearing on this Motion pursuant to Local Rule 7.1(D).

Respectfully submitted,

THE TRUST FOR PUBLIC LAND

By its attorneys,

/s/ Dahlia S. Fetouh  
 Richard A. Oetheimer (BBO # 377665)  
 Dahlia S. Fetouh (BBO # 651196)  
 Goodwin Procter LLP  
 Exchange Place  
 Boston, MA 02109  
 (617) 570-1000

Dated: March 9, 2007

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<sup>4</sup> Kunelius served TPL with a document request via first-class mail on February 27, 2007 pursuant to Fed. R. Civ. P. 34 seeking documents concerning these same topics. Although TPL's written response is not yet due, TPL intends to object to the production of documents responsive to these requests on the same grounds articulated in this motion.

**CERTIFICATION UNDER LOCAL RULE 7.1 AND LOCAL RULE 37.1; AND  
CERTIFICATE OF SERVICE**

I, Dahlia Fetouh, hereby certify that counsel for The Trust for Public Land conferred with Michael McLaughlin, counsel for Plaintiff, through the attached correspondence and a telephone conversation on March 9, 2007 at 11:40 a.m., in a good faith attempt to resolve or narrow the issues in this motion prior to its filing. The parties were unable to reach any agreement on the issues raised herein.

I further certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on March 9, 2007.

/s/ Dahlia S. Fetouh

Dahlia S. Fetouh

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# EXHIBIT A

UNITED STATES DISTRICT COURT  
(DISTRICT OF MASSACHUSETTS)

CIVIL ACTION NO. 05-11697 GAO

|                                  |   |
|----------------------------------|---|
| MARILYN KUNELIUS,                | ) |
| Plaintiff,                       | ) |
|                                  | ) |
| V.                               | ) |
|                                  | ) |
| TOWN OF STOW separately, A       | ) |
| PARTNERSHIP OF UNKNOWN NAME      | ) |
| BETWEEN TOWN OF STOW and THE     | ) |
| TRUST FOR PUBLIC LAND, THE       | ) |
| TRUST FOR PUBLIC LAND separately | ) |
| and CRAIG A. MACDONNELL, in his  | ) |
| individual capacity,             | ) |
| Defendants.                      | ) |
|                                  | ) |

**PLAINTIFF'S NOTICE OF  
RULE 30(b)(6) DEPOSITION OF DEFENDANT THE TRUST FOR PUBLIC LAND**

PLEASE TAKE NOTICE that Plaintiff, pursuant to Fed. R. Civ. P. 30(b)(6) and by their undersigned counsel, will take the deposition upon oral examination of Defendant, The Trust For Public Land ("TPL"). TPL shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf in regards to the subject matters known or reasonably available to TPL as described in Schedule A attached hereto. The deposition will take place before a Notary Public or other officer authorized by law to take depositions on March 12, 2007 commencing at 10:00 a.m., at the Law Offices of Michael C. McLaughlin, One Beacon Street, 33<sup>rd</sup> Floor, Massachusetts 02110, or at such other date, time and place as may be agreed among counsel.

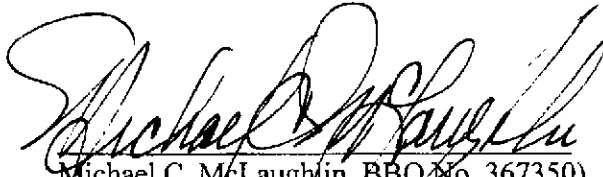
You are invited to attend and cross-examine.

Plaintiff,

Mrs. Marilyn Kunelius

By her Attorney,

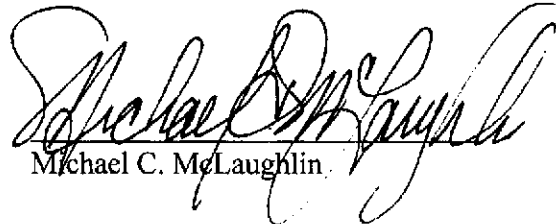
Dated: February 20, 2007



Michael C. McLaughlin, BBO No. 367350)  
Law Offices of Michael C. McLaughlin  
One Beacon Street  
Boston, MA 02108  
(617) 227-2275

**CERTIFICATE OF SERVICE**

I, Michael C. McLaughlin, do hereby certify that, on February 20, 2007, I caused a true copy of the above document to be served by hand upon the attorney of record for the defendants.



Michael C. McLaughlin

**SCHEDULE A**

**DEFINITIONS**

1. Except where the context does not permit, (i) the words “and” and “or” shall be construed to mean “and/or”; (ii) words used in the singular shall be deemed to include the plural; (iii) words used in the plural shall be deemed to include the singular; and (iv) the words “any” and “all” shall be construed to mean “any/all.”

2. The term “communication” means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

3. The term “document” means the originals, all identical and non-identical copies, and all drafts or preliminary versions of written, printed, typed, graphic, photographic, electronically or mechanically recorded matter, of any kind or nature, however produced or reproduced; including, without limitations, any books, pamphlets, letters or other forms of correspondence, telegrams, telexes, cables, reports, studies, memoranda, notes, diary entries, log entries, telephone memoranda, summaries, financial records, writings, scribbings, invoices, bills, receipts, return receipts, canceled checks, ledgers, accounts, books of account, statement, invoices for credit, credit statements, credits, debits, tape recordings, videotape recordings, motion picture films, films, photographs (including negatives and prints), blueprints, specifications, charts, diagrams, drawings, sketches, computer records, e-mails (whether or not deleted), documents backed up from software systems, whether in tape, disk or other machine readable format, and any other method, means or manner used to preserve information, data or entries on computers or other electronic data systems, and all other writings and documents of any nature.



4. The term “relating” means relating, concerning, referring to, describing, evidencing or constituting.

5. The term “person” means any natural person or any business, legal, or governmental entity or association, and includes the person’s employees, agents, attorneys, and representatives.

6. The term “TPL” shall mean defendant The Trust for Public Land, and its officers, directors, employees, agents, brokers, attorneys, representatives, and affiliates, or any related corporations, subsidiary, or parent corporation including those incorporated or licensed to do business in Massachusetts or any other state.

7. The term “The TPL Land Action Fund” shall mean any entity with such name located at 33 Union Street, Boston, Massachusetts, including its officers, directors, employees, agents, brokers, attorneys, representatives, and affiliates.

8. The term “Complaint” shall mean the complaint filed in the United States District Court for the District of Massachusetts on August 16, 2005, in the action captioned *Marilyn Kunelius v. Town of Stow, et al.*, Civil Action No. 05-11697-GAO.

9. The term “P&S Agreement” shall mean that certain agreement by and between Marilyn Kunelius and Cohousing Resources, LLC, entered in October, 2002.

10. The “Plaintiff’s Property” shall mean the property owned by Ms. Kunelius known as and located at 142 and 144 Red Acres Road, Stow, Massachusetts, and that is the subject of the Complaint.

11. The term “Right of First Refusal” means certain Assignment and Acceptance between the Town of Stow and The Trust For Public Land dated February 12, 2007.

**Subject Matters for Rule 30(b)(6) Examination**

1. The sources of funding for the purchase of the Plaintiff's Property as a result of TPL's exercise of the right of first refusal.
2. TPL's financial status from January 1, 2003 through December 31, 2003 including but not limited to TPL's available cash assets, other liquidate asserts, lines of credit in place or available to TPL upon application, lines of credit available to TPL where such lines of credit were supplied by banks or financial institutions connected to or in any way related to TPL's officer, directors, Board of Advisors or any other such designation.
3. TPL's bookkeeping, applications, withdrawal histories, repayment histories, notices of default, and disbursement schedules with regard to a line(s) of credit with Wainwright Bank, or any other any bank, financial institution, private lender, including brokerage firms or any other source, for any amount of money or any other loan or lending vehicle in place or applied for from 2002 through 2007.
4. TPL's role in assisting in the drafting and/or presentation of a warrant for a town meeting and the date that TPL became involved in the evaluation of Plaintiff's property.
5. The decision of TPL not to purchase the Plaintiff's property.
6. TPL participation in or lobbying for any changes in the M.G.L. c. 61, both before, during, and after the exercise of the right of first refusal of TPL.
7. Any policy or decision, whether official or unofficial, in which TPL has concluded that development by it under the provisions of M.G.L. c. 40B is unacceptable to TPL.
8. TPL's decision to forgo a development of the Plaintiff's property under the provisions of M.G.L. c. 40B.

9. TPL's identifying the "liquidated damage clause defense" as currently being used by TPL in the instant litigation.

10. The establishment of the "TPL Land Action Fund" and the "TPL Land Action Fund's" purpose.

11. Negotiations, instructions, and assistance to the Friends of Red Acre's effort to raise funds in connection with the Plaintiff's Property.

12. TPL's appraisal or estimation of value of the Plaintiffs' Property prior to and subsequent to the exercise of the right of first refusal.

# EXHIBIT B

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March 5, 2007

**BY FACSIMILE AND FIRST-CLASS MAIL**

Michael C. McLaughlin, Esq.  
Law Offices of Michael C. McLaughlin  
One Beacon Street, 33<sup>rd</sup> Floor  
Boston, MA 02108

RE: Marilyn Kunelius v. Town of Stow, Partnership of an Unknown Name between Town of Stow and the Trust for Public Land, The Trust for Public Land and Craig A. MacDonnell  
Civil Action No.: 05-11697

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Dear Mr. McLaughlin:

The following outlines the response of defendant The Trust for Public Land ("TPL") to Plaintiff's Notice of Rule 30(b)(6) Deposition of Defendant The Trust For Public Land ("30(b)(6) Notice"). The numbers below correspond to the numbered "Subject Matters" listed in Schedule A to the 30(b)(6) Notice.

Topics 1, 4, 5, 8, 11, and 12

The topics listed above concern activities related to the proposed purchase of Ms. Kunelius' property. At the deposition of Craig A. MacDonnell, the Massachusetts State Director of TPL, which was taken over the course of a full day on February 8, 2007, you inquired into each of these topics. Pursuant to our discussion at the conclusion of Mr. Perry's deposition on February 26, 2007, TPL hereby notices its intent to adopt Mr. MacDonnell's testimony concerning these project-specific topics as its own. Accordingly, TPL will not produce another witness on these topics.

Topics 2 and 3

TPL objects to the production of a witness to testify on the subject matters listed in Topics 2 and 3 because they are wholly irrelevant to the current dispute. For the reasons articulated in TPL's Motion to Quash Plaintiff's Subpoena and Notice of Deposition to the Keeper of the Records of Wainwright Bank ("Motion to Quash"), TPL believes these topics cover subject matter that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence regarding the claims and defenses in this dispute. As we stated in the Motion to Quash, details concerning TPL's liquid assets and lines of credit are irrelevant to the question of liability or the damages to which Ms. Kunelius may be entitled. TPL has never argued that TPL could not have

## GOODWIN | PROCTER

Michael C. McLaughlin, Esq.  
March 5, 2007  
Page 2

resorted to its own funds or available resources to complete the purchase of Ms. Kunelius' property. Rather, TPL made the decision not to resort to them where there was no prospect of completing TPL's mission by raising sufficient funds to recover TPL's investment and transfer the property to a long-term steward. Furthermore, you already appear to have possession of TPL's publicly-available annual reports, which contain financial information. To the extent you require copies of those publicly-available documents, we will provide a copy of the annual report for 2003.

In addition to the irrelevance of Topics 2 and 3, they are overbroad, seeking extensive categories of information concerning TPL's "bookkeeping, applications, withdrawal histories, repayment histories, notices of default, and disbursement schedules" for all of TPL's lines of credit over a five-year period. Even assuming TPL could produce a witness with knowledge on the wide-ranging details you seek, you have demonstrated no need for such far-reaching information.

Accordingly, TPL will not produce a witness on these topics. Assuming we cannot reach an agreement concerning Topics 2 and 3, TPL will seek a protective order to prohibit testimony into these areas.

### Topics 6, 7, 9, and 10

Because these topics include subject areas that are not project-specific and were not covered fully in Mr. MacDonnell's deposition, TPL will produce a witness to testify on Topics 6, 7, 9, and 10.

We are available for this deposition on March 22, 2007, one of the dates we were given for your availability.

Thank you.

Very truly yours,



Dahlia S. Fetouh

DSF/baf

cc: James B. Conroy, Esq.  
Deborah I. Ecker, Esq.

# EXHIBIT C

03/07/07 15:15 FAX

JEFFREY GLASSMAN

002

LAW OFFICES OF  
MICHAEL C. MCLAUGHLIN  
ONE BEACON STREET  
33RD FLOOR  
BOSTON, MA 02108  
(617) 227-2275  
FACSIMILE (617) 722-9999

March 7, 2007

**BY FAX**

Dahlia Fetouh, Esq.  
Goodwin Procter, LLP  
Exchange Place  
Boston, MA 02109

Re: Kunelius v. The Town of Stow, et al.  
Civil Action No. 05-11697-GAO

Dear Ms. Fetouh:

I am writing to you in response to your March 5, 2007 letter. I disagree that topic one was answered by MacDonnell. In fact, to the contrary MacDonnell claimed to know nothing about the line of credit.

1. I believe I have every right to inquire concerning the line of credit and I intend to do so. You are required in the absence of protective order to provide TPL personnel to answer such questions.

2. I disagree that MacDonnell has answered the question concerning fund raising efforts of the Friends of Red Acre as he claims to have little or no knowledge of same.

3. I disagree with your statement concerning topic 2 and 3. The Motion to Quash deals with Wainwright Bank's documents not TPL's. TPL's financial ability is in fact an issue in this case as it relates to Fraud, 93A etc. TPL has argued that it was "unable to purchase the Property." Your statement in your letter is a fundamental misrepresentation of what your firm has told Judge O'Toole. In addition, it now appears that the financial conditions of TPL were representations made to the Commonwealth as to its ability to purchase the Property and is most certainly relevant. I have every intention of asking questions concerning topics 2 and 3 and you are obligated to provide a witness. I would caution you that MacDonnell claimed that he knows nothing about the financing and this has already opened the door concerning this issue.

It is your obligation to file for a Protective Order. It is my suggestion that we schedule at the earliest possible date a concerning the same in which the Motion to Quash



03/07/07 15:15 FAX

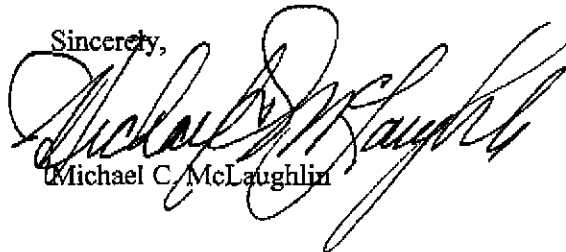
JEFFREY GLASSMAN

003

and the Motion for Protective Order could be heard simultaneously with my Motion for Sanctions which I intend to file today or tomorrow.

Please call me so that we can discuss this.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. McLaughlin", written over a printed name.

Michael C. McLaughlin

Enclosure

Cc: Deborah I. Ecker, Esq. (by mail)  
James B. Conroy, Esq. (by mail)

# EXHIBIT D

**DEPOSITION OF CRAIG MACDONNELL****MINIDEP by Kenson**

Volume: 1  
 Pages: 1-251  
 Exhibits: 23

**INDEX**

|                  |   |   |    |    |
|------------------|---|---|----|----|
| Witness          | D | C | RD | RC |
| CRAIG MacDONNELL | 6 |   |    |    |

- 3 -

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-11697-GAO

MARILYN KUNELIUS,  
 Plaintiff,

v.

TOWN OF STOW, separately,  
 A PARTNERSHIP OF UNKNOWN NAME  
 BETWEEN TOWN OF STOW and THE  
 TRUST FOR PUBLIC LAND, THE  
 TRUST FOR PUBLIC LAND, separately,  
 and CRAIG A. MacDONNELL, in his  
 individual capacity,  
 Defendants.

DEPOSITION of CRAIG MacDONNELL, a witness called by and  
 on behalf of the plaintiff, taken pursuant to the  
 Massachusetts Rules of Civil Procedure, before Roberta J.  
 Daniels, a Court Reporter and Notary Public within and for  
 the Commonwealth of Massachusetts, at the Law Offices of  
 Michael C. McLaughlin, One Beacon Street, Boston,  
 Massachusetts 02108, on Thursday, February 8, 2007,  
 scheduled to commence at 10:00 A.M.

**APPEARANCES**

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 Law Offices of Michael C. McLaughlin  
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 Boston, Massachusetts 02108  
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Dahlia S. Fetouh, Esquire  
 Goodwin Procter, LLP  
 Exchange Place  
 Boston, Massachusetts 02109  
 Counsel for Defendant Trust for Public Land

James B. Conroy, Esquire  
 Donnelly, Conroy & Gelhaar, LLP  
 One Beacon Street, 33rd floor  
 Boston, Massachusetts 02108  
 Counsel for Defendant Craig MacDonnell

Also present:  
 Lucie DeBellis, Paralegal  
 The Law Offices of Michael C. McLaughlin  
 Marilyn Kunelius, Plaintiff  
 David Norris, Husband of the plaintiff

**EXHIBITS**

| No. | Description   | Page |
|-----|---|------|
| 1   | TPL corporate registration form                               | 16   |
| 2   | Notice of deposition  | 17   |
| 3   | TPL Land Action Fund corporate registration form              | 18   |
| 4   | Stow annual report, 2003                                      | 35   |
| 5   | Stow letter with attachments to Kunelius, 2-12-03             | 45   |
| 6   | MacDonnell letter to Perry, 2-11-03                           | 49   |
| 7   | Conditions for right of first refusal                         | 51   |
| 8   | Minutes of Stow CPC meeting, 2-10-03                          | 64   |
| 9   | Printout of TPL Web site                                      | 75   |
| 10  | Stow Finance Committee minutes, 1-7-03                        | 79   |
| 11  | DHCD grant application  | 105  |
| 12  | TPL Web site excerpt  | 124  |
| 13  | MacDonnell letter to Kachajian, 9-9-03                        | 137  |
| 14  | Conditions for right of first refusal                         | 154  |
| 15  | Sommerlad email to Kennedy                                    | 164  |
| 16  | Jacobs email to Sommerlad and Kennedy                         | 166  |
| 17  | Stow Board of Selectmen meeting, 2-11-03                      | 191  |
| 18  | Stow Conservation Commission documents                        | 193  |
| 19  | MacDonnell email to Perry, 4-17-03                            | 209  |
| 20  | Friends of Red Acre letter to Stow Board of Selectmen, 6-6-03 | 212  |

- 4 -

**DEPOSITION OF CRAIG MACDONNELL**

**MINIDEP by Kenson**

21 Pelletier letter to Stow Board of  
Appeals, 9-25-03 228

22 MacDonnell letter to Kachajian, 7-6-04 234

23 MacDonnell letter to Perry, 1-5-03 238

- 5 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 PROCEEDINGS  
2 Thursday, February 8, 2007  
3 10:01 A.M.  
4 (Plaintiff and Mr. Norris not present)  
5 CRAIG MacDONNELL, first having been  
6 satisfactorily identified by the production of a  
7 Massachusetts driver's license and then duly  
8 sworn, on oath, deposes and says as follows:  
9 MR. McLAUGHLIN: Before we start, we'll  
10 use the usual stipulations? We'll reserve all  
11 objections till the time of trial, except as to  
12 form, waive the signature of the deposition?  
13 MR. CONROY: Waive the notary.  
14 MR. McLAUGHLIN: Yes, right.  
15 MR. CONROY: Right.  
16 DIRECT EXAMINATION  
17 By MR. McLAUGHLIN:  
18 Q Could you please state your name and spell it, please?  
19 A It's Craig MacDonnell, C-R-A-I-G. Last name is M-A-A-C-  
20 D-O-N-N-E-L-L.  
21 Q And can you tell me what your address is?  
22 A 800 Old Road to Nine Acre Corner, Concord, Mass.  
23 Q Can you tell me what your occupation is?  
24 A I work for the Trust for Public Land.

- 6 -

1 Q And what is the Trust for Public Land?  
2 A The Trust for Public Land is a 501c3, a national non-  
3 profit land conservation organization.  
4 Q And what do you do for them?  
5 A I'm the Massachusetts state director.  
6 Q In 2002, what was your job at TPL?  
7 A I was the Massachusetts state director.  
8 Q Does each state have a director?  
9 A Most states where TPL works have a director.  
10 Q Is there a regional headquarters for TPL for the  
11 northeast region?  
12 A Yes.  
13 Q Where is that?  
14 A Boston.  
15 Q And is that the same place as your office?  
16 A Yeah.  
17 Q And is there someone in charge of the region that you  
18 report to?  
19 A Yes.  
20 Q And who is that?  
21 A Whitney Hatch.  
22 Q Is Whitney Hatch a man?  
23 A He is.  
24 Q Whitney, okay. And what is his title?

- 7 -

1 A Regional director.  
2 Q And do you still report to Whitney Hatch?  
3 A I do.  
4 Q In 2003, were you also the Massachusetts director?  
5 A In 2003, I was the Massachusetts state director.  
6 Q In your role as Massachusetts state director, could  
7 you define what your authorities were as far as  
8 acquisitions of property?  
9 A What do you mean by define my authority?  
10 Q Well, were you in a position to bind TPL into  
11 contracts, for example?  
12 MR. CONROY: Objection.  
13 A Some contracts.  
14 Q When I say in a position, did you have the authority  
15 to?  
16 A Well, in my position, there were some contracts that I  
17 could bind TPL with respect to.  
18 Q And what kind of contracts were those?  
19 A Very small.  
20 Q Was there a dollar amount limitation?  
21 A There was.  
22 Q What was that?  
23 A I don't know.  
24 Q Was it less than a million dollars?

- 8 -

1 A Well less than a million.  
2 Q Less than a half a million dollars?  
3 A Yes.  
4 Q Less then two hundred and fifty thousand?  
5 A Yes.  
6 Q Do you have a general idea what the limitation was?  
7 A I believe -- well, it was very small, but I don't know  
8 a number.  
9 Q Do you have a general estimation of what -- well, let  
10 me strike that.  
11 A I've already said I don't remember.  
12 Q If a contract was put in front of you, was there a  
13 point where you would say to yourself, gee, I can't  
14 sign this; this is too big?  
15 A Are we talking about now or then?  
16 Q Then.  
17 A Yes.  
18 Q And what would that number be that would cause you to  
19 think you didn't have the authority?  
20 A Well, I don't recall as to what it was then, so I  
21 can't testify to that.  
22 Q Are you on any medication that would affect your  
23 memory?  
24 A No.

- 9 -

1 Q Can you tell me what your background is, your  
2 educational background, please?  
3 A I'm trained as a lawyer.  
4 Q And what kind of lawyer were you trained to be?  
5 A A litigator.  
6 Q Did you practice as an attorney?  
7 A I did.  
8 Q And where did you practice?  
9 A Two law firms.  
10 Q What are the names of the two firms?  
11 A Nutter, McClennen & Fish and Keegan, Werlin & Pabian.  
12 Q Where is Keegan, Werlin, Pabian?  
13 A Boston.  
14 Q And can you tell me when you worked for these two  
15 firms, sequentially?  
16 A I worked for Nutter, McClennen & Fish from 1983  
17 through '87 or '88. I worked for Keegan, Werlin from  
18 the early '90s through the late '90s.  
19 Q Why did you leave Nutter?  
20 A To change my career.  
21 Q And you were a litigator at Nutter?  
22 A Yes.  
23 Q Were you a partner?  
24 A No.

- 10 -

1 Q Were you an associate?  
2 A Yes.  
3 Q And at Keegan, were you a partner?  
4 A Yes.  
5 Q Did you go in as a partner?  
6 A No.  
7 Q Did you go in as an associate?  
8 A I did.  
9 Q How long were you an associate there?  
10 A About three years.  
11 Q So, in the span of between approximately '90 and the  
12 late '90s, you were three years an associate and up to  
13 perhaps as many as six or seven as a partner?  
14 A Approximately.  
15 Q And what did you do between '88 and '90?  
16 A I worked for the Department of Fisheries, Wildlife &  
17 Environmental Law Enforcement.  
18 Q And what was your position there?  
19 A I was a lawyer.  
20 Q In their legal department?  
21 A Yes.  
22 Q Is there a separate legal department for that, for the  
23 Department of Fisheries?  
24 A Well, no, not really. I mean, there were lawyers, but

- 11 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 I don't recall it being organized as a department.  
 2 Q And that's a federal department, or is that a state  
 3 department?  
 4 A State.  
 5 Q So, it's Commonwealth of Massachusetts?  
 6 A Correct.  
 7 Q And who was your supervisor at the Department of  
 8 Fisheries?  
 9 A The commissioner.  
 10 Q And who was that?  
 11 A Walter Bickford at the beginning and, later, John  
 12 Phillips.  
 13 Q Where did you go to law school?  
 14 A Cornell.  
 15 Q And undergrad?  
 16 A Nasson.  
 17 Q Could you spell that?  
 18 A N-A-S-S-O-N.  
 19 Q And where is that?  
 20 A Springvale, Maine.  
 21 Q When did you graduate from law school?  
 22 A '83.  
 23 Q In your practice as a litigator, did you practice in  
 24 state courts?

- 12 -

1 A Yes.  
 2 Q Federal courts?  
 3 A Yes.  
 4 Q And what kind of litigation did you practice?  
 5 A Mostly environmental.  
 6 Q Did you ever do corporate?  
 7 MS. FETOUH: Objection.  
 8 Q Did you ever practice corporate law?  
 9 A I worked on corporate issues. I don't know if you  
 10 could call that practicing corporate law.  
 11 Q Did you ever practice tax law?  
 12 A I worked on tax issues, but I don't know if you could  
 13 say I practiced tax law.  
 14 Q Other than your degree from Cornell, do you have any  
 15 advanced law degrees?  
 16 A No.  
 17 Q Have you taken any advanced professional education  
 18 beyond, for example, MCLE courses or that sort of  
 19 thing?  
 20 A I have.  
 21 Q And what were those in?  
 22 A I took so many that I can't remember.  
 23 Q When you left Keegan, what was the reason you left  
 24 Keegan?

- 13 -

1 A To join the Trust for Public Land.  
 2 Q Were you asked to leave, or did you leave because you  
 3 wanted --  
 4 A I chose to leave.  
 5 Q You mentioned that TPL is a -- is it a non-profit or  
 6 charitable institution, or how do you describe it?  
 7 A It's a 501c3.  
 8 Q And is that a charitable institution?  
 9 A Correct.  
 10 Q Is it also a non-profit?  
 11 A Correct.  
 12 Q Is that the same designation?  
 13 A (No response.)  
 14 Q Are you aware whether or not TPL has a designation of  
 15 being a non-profit with the Secretary of State?  
 16 A I do not know.  
 17 Q Have you ever checked to see whether TPL is listed as  
 18 a for-profit corporation?  
 19 A I have not.  
 20 Q In your role as director of the Massachusetts area,  
 21 did you in 2003 undertake any legal work for TPL?  
 22 MR. CONROY: Objection.  
 23 A I don't know how to answer that question. I mean, I  
 24 thought about legal issues. As a lawyer, I can't help

- 14 -

1 myself.  
 2 Q I'm going to put a document in front of you, which I  
 3 have not marked yet, and ask you if you've ever seen a  
 4 document like that.  
 5 A I have not.  
 6 Q Can I ask you to look at the second page?  
 7 A (Examining.)  
 8 Q Do you see where it appears to indicate that TPL is a  
 9 for-profit corporation? Do you see that?  
 10 A You're pointing to the X in the middle of the page?  
 11 Q Yeah.  
 12 A I see the X.  
 13 Q And that would be beside the for-profit designation,  
 14 is that correct?  
 15 A Correct.  
 16 Q And you don't have any idea why that's listed with the  
 17 Commonwealth as a for-profit corporation. Is that  
 18 correct?  
 19 A Correct.  
 20 Q Do you share in bonuses issued by TPL in connection  
 21 with monies that are derived from TPL's operation?  
 22 A There are no bonuses at TPL.  
 23 Q You're on a salary at TPL?  
 24 A Correct.

- 15 -

1 Q What is your salary?  
 2 A Somewhere in the eighty thousand to ninety thousand  
 3 dollar range, maybe between ninety and a hundred. I'm  
 4 not quite sure where it is right now.  
 5 (Plaintiff and Mr. Norris enter)  
 6 Q You're here today because you received or your  
 7 attorney received a notice of deposition, is that  
 8 correct?  
 9 A I believe that's correct.  
 10 MR. McLAUGHLIN: Can I have that marked  
 11 as Exhibit 1, please?  
 12 (WHEREUPON, Exhibit No. 1, TPL  
 13 corporate registration form, marked for  
 14 identification.)  
 15 Q Have you seen this notice of deposition before?  
 16 MR. CONROY: Can I just clarify for the  
 17 record? Exhibit 1 is the document that you've  
 18 just been asking questions about, correct?  
 19 MR. McLAUGHLIN: Yes.  
 20 MR. CONROY: Okay.  
 21 A I believe I've seen this before.  
 22 MR. McLAUGHLIN: Okay. We'll just have  
 23 that marked.  
 24 Q And that's why you're here today, correct?

- 16 -

1 A Essentially.  
 2 MR. McLAUGHLIN: We'll have that marked  
 3 as Exhibit 2.  
 4 (WHEREUPON, Exhibit No. 2, notice of  
 5 deposition, marked for identification.)  
 6 Q Do you hold any other positions with TPL--related  
 7 entities?  
 8 MS. FETOUH: Objection.  
 9 A I don't know what you mean by TPL--related entities.  
 10 Q Well, have you ever heard of TPL Land Action Fund?  
 11 A I have.  
 12 Q Well, you hesitated in answering that, and I'm  
 13 wondering. Is that because you're generally  
 14 unfamiliar with the TPL Land Action Fund?  
 15 MR. CONROY: Objection.  
 16 A The reason I hesitated is that I was trying to  
 17 remember the name.  
 18 Q What is the TPL Land Action Fund?  
 19 A I don't know.  
 20 Q I'm going to put before you a document and have you  
 21 take a look at it from the Secretary of State. Does  
 22 that refresh your memory as to what the TPL Land  
 23 Action Fund is?  
 24 A No.

- 17 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 Q What's the address of TPL where you work? Where do  
2 you work? What's the address?  
3 A 33 Union Street in Boston.  
4 Q And I note here that the document in front of you is  
5 also 33 Union Street. Do you see that?  
6 A Yes, it's misspelled here.  
7 Q What's misspelled, Union?  
8 A The word Union, yes.  
9 MR. McLAUGHLIN: Can we mark that as  
10 Exhibit -- whatever it is, three?  
11 (WHEREUPON, Exhibit No. 3, TPL Land  
12 Action Fund corporate registration form, marked  
13 for identification.)  
14 Q Who is Ernest Cook?  
15 A He's a gentleman who works for the Trust for Public  
16 Land.  
17 Q And does he work with you?  
18 A He works in the same building I do. He is employed by  
19 the conservation finance office of the Trust for  
20 Public Land.  
21 Q Is that a separate entity?  
22 A No.  
23 Q So, when you say conservation finance, is that the  
24 division of TPL that deals with financial matters for

- 18 -

1 the Secretary of State?  
2 A No.  
3 Q And what makes you believe that TPL is a 501c3?  
4 MR. CONROY: Objection.  
5 A That is what I had been told.  
6 Q So, you haven't specifically seen documents that would  
7 verify whether it is or is not.  
8 A I may have, but I don't currently recall.  
9 Q Can you tell me how TPL became acquainted with the  
10 Town of Stow concerning the Kunelius property?  
11 A Yes.  
12 Q Would you do that, please?  
13 A I believe the Trust for Public Land was contacted by a  
14 fellow named Peter Christianson.  
15 Q And who is Peter Christianson?  
16 A A resident of Stow.  
17 Q Did he have some official position with the Town of  
18 Stow? Was he an elected official or anything like  
19 that?  
20 A Not to my knowledge.  
21 Q And did he contact you directly?  
22 A No.  
23 Q Who did he contact?  
24 A I don't remember.

- 21 -

1 the entity?  
2 A No.  
3 Q Okay. What is conservation finance division?  
4 A I don't think it's a division. It's an office that  
5 helps communities raise money for land acquisition.  
6 Q So, he, like you, is an employee of TPL as far as you  
7 understand?  
8 A Yes.  
9 Q And is today the first time you've become aware that  
10 he is the president of the TPL Land Acquisition Fund?  
11 MS. FETOUH: Objection.  
12 A The Land Action Fund?  
13 Q The Land Action Fund, I'm sorry, Action Fund.  
14 MR. CONROY: Objection.  
15 A Yes, it is.  
16 Q I note that under Exhibit 3, on Exhibit 3, it says  
17 that the TPL Land Action Fund was organized in the  
18 year 2000, on the first page about halfway down. Are  
19 you at all surprised that this entity has existed for  
20 the last seven years or thereabouts without your  
21 knowledge?  
22 MR. CONROY: Objection.  
23 A I don't have a reaction one way or another.  
24 Q On the second page, it also indicates that it is for-

- 19 -

1 Q Do you recall the circumstances as to why he called  
2 you?  
3 A Yes.  
4 Q What were those?  
5 A It was with respect to a piece of property near his  
6 house.  
7 Q And was that the Kunelius property?  
8 A The property at 142 Red Acre Road.  
9 Q And do you have reason to believe that's not the  
10 Kunelius property?  
11 A No.  
12 Q You don't recall who he contacted at TPL. Is that  
13 your testimony?  
14 A I do not.  
15 Q Do you recall the reasons that he contacted TPL?  
16 MS. FETOUH: Objection.  
17 A Yes.  
18 Q What were those?  
19 A It was with respect to a potential conservation  
20 project.  
21 Q Did Mr. Christianson tell you there was a potential  
22 project there at the Kunelius property?  
23 A I don't believe he used those words.  
24 Q Well, you didn't actually talk to him about it, so how

- 22 -

1 profit. Do you see that?  
2 A Are you looking at the X in the middle of the second  
3 page?  
4 Q Yes.  
5 A I see the X.  
6 Q And the X is to the left of the designation for-  
7 profit. Do you see that?  
8 A I do.  
9 Q Are you surprised that there is a for-profit  
10 designation for any entity related to TPL?  
11 A Yes.  
12 Q And as an attorney, were you at all involved in filing  
13 any documents with the Secretary of State for TPL  
14 during your tenure as a director of the Massachusetts  
15 section or region?  
16 MR. CONROY: Objection.  
17 MS. FETOUH: Objection.  
18 A Well, which question would you like me to answer?  
19 Q Well, let's go back. Shall we call it the  
20 Massachusetts region? Is that what you're the  
21 director of, or is it State of Massachusetts or?  
22 A You can call it the Massachusetts state office.  
23 Q Okay. So, in your role as the director, were you ever  
24 involved in filing any documents on behalf of TPL with

- 20 -

1 do you know what his words were?  
2 A I don't know what his words were.  
3 Q Do you know who established that there was a potential  
4 conservation project at the Kunelius property?  
5 A I'm not sure I understand what you mean by  
6 established.  
7 Q Well, you said that he contacted you about a potential  
8 conservation project at the Kunelius property at 142  
9 Red Acre Road, and my question is --  
10 A He contacted TPL.  
11 Q And my question is: who said there was a potential  
12 project there? If you don't know what he said, how  
13 did you know there was a potential project there?  
14 A The words potential project are my words.  
15 Q Do you recall any of the circumstances surrounding the  
16 contact of TPL by Peter Christianson resulting from  
17 any discussions you had with any other people at TPL?  
18 A Yes.  
19 Q Can you tell me what you know about that?  
20 A I believe he talked to other people in my office about  
21 the potential for a conservation project on the  
22 Kunelius property.  
23 Q Now, he was not the owner at that time of the Kunelius  
24 property. Is that correct?

- 23 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 A Correct.  
 2 Q Was it unusual for someone who is not an owner of a  
 3 property to contact you concerning the establishment  
 4 of a conservation project on someone else's property?  
 5 A No.  
 6 Q Does that happen regularly?  
 7 A Yes.  
 8 Q Do you recall who the people were in your office?  
 9 A I believe he contacted Valerie Talmadge.  
 10 Q And who is Valerie Talmadge?  
 11 A Valerie Talmadge is the director of projects for the  
 12 New England region.  
 13 Q Is she still an employee of TPL?  
 14 A Yes.  
 15 Q How many employees are there at TPL in Boston?  
 16 A Well, without actually taking the time to count the  
 17 offices, I'd say in the neighborhood of twenty-five or  
 18 thirty.  
 19 Q And were there 25 or 30 back in 2003?  
 20 A Maybe a few less.  
 21 Q Did you have discussions with Valerie Talmadge  
 22 concerning TPL's involvement with the property  
 23 which -- instead of calling it the Kunelius  
 24 property, I'm just going to call it the property

- 24 -

1 A That's what I don't remember.  
 2 Q Was it prior to your involvement in attending any  
 3 public hearings in the Town of Stow concerning Mosaic  
 4 Commons?  
 5 MS. FETOUH: Objection.  
 6 A That's what I don't remember, is when.  
 7 Q You're familiar with the term Mosaic Commons?  
 8 A I'm familiar with the entity known as Mosaic Commons.  
 9 Q And what is it?  
 10 A I understand it's a development company.  
 11 Q And did you have an understanding at some point that  
 12 Mosaic Commons had intended to purchase the Kunelius  
 13 property?  
 14 A Yes.  
 15 Q And is it fair to say that the intended purchase of  
 16 the Kunelius property by Mosaic Commons was one of the  
 17 reasons that you were contacted concerning TPL's  
 18 involvement?  
 19 A The proposed land use change, it's my understanding,  
 20 was the reason that we were contacted.  
 21 Q And the proposed land use change, by that you mean  
 22 that the Kunelius property was under either a farm  
 23 designation or forestry designation under Chapter 61  
 24 and, if it were sold to Mosaic Commons, it would be

- 27 -

1 from now on. Did you have discussions with her  
 2 concerning the property?  
 3 A I did.  
 4 Q And what do you recall from those discussions?  
 5 A I have a general recollection of them, that Peter  
 6 Christianson proposed that TPL consider working with  
 7 the Town of Stow to conserve the Kunelius property.  
 8 Q Do you recall discussing with Valerie Talmadge what  
 9 motivated Mr. Christianson to come to TPL?  
 10 A No.  
 11 Q Do you recall that there was a 40B development on the  
 12 Kunelius property approximately at the time that TPL  
 13 was contacted?  
 14 A Yes.  
 15 Q Does that refresh your memory at all as to why  
 16 Mr. Christianson had contacted TPL, i.e., that  
 17 they wanted a conservation development rather  
 18 than a 40B development?  
 19 A Does that itself refresh my recollection?  
 20 Q Yes.  
 21 A No.  
 22 Q Do you have any knowledge concerning  
 23 Mr. Christianson's wish that a 40B not be built  
 24 on property adjacent to his property?

- 25 -

1 changed to some other designation. Is that right?  
 2 A By that I mean that there was development planned.  
 3 That's all I mean.  
 4 Q Let me go back. Do you recall attending meetings in  
 5 December of 2002 where Mosaic Commons made  
 6 presentations to the Town of Stow, the Board of  
 7 Selectmen?  
 8 A I don't remember seeing presentations.  
 9 Q Do you recall whether anyone at TPL attended meetings  
 10 where Mosaic Commons made a presentation to the Board  
 11 of Selectmen or any other board of the Town of Stow?  
 12 A The introduction to your question, do I remember if  
 13 anybody from TPL?  
 14 Q Yes.  
 15 A No.  
 16 Q Would you have been the point person, in other words,  
 17 the person with the general authority, to go to such  
 18 meetings and make comments at such meetings on behalf  
 19 of TPL?  
 20 MS. FETOUH: Objection.  
 21 A I don't know about the authority question. So, I'm  
 22 not sure how to answer that.  
 23 Q Well, would TPL send an intern to have discussions  
 24 with the town's Board of Selectmen concerning the

- 28 -

1 A Yes.  
 2 Q And is it fair to say that Mr. Christianson made that  
 3 known to TPL fairly early on in his discussions with  
 4 TPL involving the possibility of TPL getting a  
 5 conservation restriction on the property?  
 6 A I don't recall.  
 7 Q Do you recall ever meeting Mr. Christianson yourself?  
 8 A Yes.  
 9 Q And how long after his initial contact with TPL did  
 10 you meet him, approximately?  
 11 A I'm not sure.  
 12 Q Do you recall approximately when the initial contact  
 13 was made from Mr. Christianson to TPL?  
 14 A I believe it was in the winter.  
 15 Q The winter of 2002?  
 16 A I'm not sure.  
 17 Q Did Mr. Christianson come to your office at some point  
 18 prior to you contacting the Town of Stow officials  
 19 concerning the possibility of TPL's involvement?  
 20 A I don't know when, in the sequence of things, he came  
 21 to TPL's office.  
 22 Q Do you recall meeting with him in your office?  
 23 A I do.  
 24 Q And when was that?

- 26 -

1 possibility of having TPL assist the town in some way?  
 2 MR. CONROY: Objection.  
 3 MS. FETOUH: Objection.  
 4 A Well, TPL scopes projects in a lot of different ways  
 5 and gathers lots of information about projects ahead  
 6 of time. Sometimes that involves project managers.  
 7 Sometimes that involves interns.  
 8 Q Tell me about the scoping of a project. Does that  
 9 mean that, prior to a potential sale of property that  
 10 might change a land use designation, you might know  
 11 about that even before the sale occurs?  
 12 MR. CONROY: Objection.  
 13 MS. FETOUH: Objection.  
 14 A I don't understand your question.  
 15 Q Well, tell me what you mean when you say scopes a  
 16 project.  
 17 A Analyzes a potential project. That's what scope  
 18 means.  
 19 Q And what do you do to analyze a project?  
 20 A You have discussions with local representatives. You  
 21 take a look at sort of the whole constellation of  
 22 factors that enable conservation projects to occur,  
 23 including the availability of conservation financing,  
 24 various transactional pieces, and you make an

- 29 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 assessment about the political interest of, in this  
2 case, a town to undertake a conservation project.  
3 Q And did such a scoping occur with regard to the  
4 Kunelius property?  
5 A Yes.  
6 Q And do you recall when that scoping began?  
7 A No.  
8 Q Is it likely that it began when you were first  
9 contacted by Mr. Christianson?  
10 A Yes.  
11 Q Other than Mr. Christianson, who else attended the  
12 meeting with you at your office that you mentioned  
13 earlier?  
14 A The meeting that I mentioned, if you recall, I  
15 couldn't put a date on it, and, actually, as I think  
16 about it now, I can't remember who else was there. I  
17 do remember meeting Mr. Christianson in my office.  
18 Q Do you recall whether other people were there?  
19 A I don't recall.  
20 Q Do you recall whether other TPL personnel were there?  
21 A I don't recall.  
22 Q Is it likely that Valerie Talmadge would have been  
23 there?  
24 MS. FETOUH: Objection.

- 30 -

1 A I don't know how to answer it. I mean, I can tell you  
2 what I remember. What I remember is that I did meet  
3 with Mr. Christianson, but I don't remember who else  
4 was there.  
5 Q And if I've asked this question, I apologize. Do you  
6 recall, in that meeting, Mr. Christianson looking for  
7 ways to prevent a 40B development occurring on the  
8 Kunelius property?  
9 A The focus of the conversation, if I remember it in  
10 that first meeting, was the creation of a conservation  
11 project, and how one would do that, more than the  
12 prevention of an alternative.  
13 Q Do you recall that Mr. Christianson was concerned  
14 about low-income housing being adjacent to his  
15 property?  
16 A No.  
17 Q At some point, after meeting with Mr. Christianson,  
18 did you initiate any contact with the Town of Stow on  
19 behalf of TPL?  
20 A I don't recall whether I initiated any contact.  
21 Q Who would have initiated contact with the Town of  
22 Stow, if you did not, from TPL?  
23 MR. CONROY: Objection.  
24 MS. FETOUH: Objection.

- 31 -

1 A Normally, the person who would be handling the  
2 potential scoping would make that contact.  
3 Q And who was that in this case?  
4 A That would be me.  
5 Q So, is it likely that you were the person that  
6 contacted the Town of Stow?  
7 A Well, I'd like to tell you that I remember contacting  
8 the Town of Stow, but at this point in time, I just  
9 don't remember that. I've had conversations with  
10 Stow, subsequently, but whether or not I was the one  
11 who initiated that contact, I just don't recall.  
12 Q But since you were the person running the scoping of  
13 the project, it is likely that you were the person  
14 that would contact the town? Is that correct?  
15 MR. CONROY: Objection.  
16 MS. FETOUH: Objection.  
17 MR. CONROY: I think it's been asked  
18 and answered.  
19 A I've tried to tell you what I remember about it. I  
20 don't recall whether, in this situation, it was me or  
21 not.  
22 Q How old are you?  
23 A Fifty.  
24 Q Have you testified before in a deposition?

- 32 -

1 A No.  
2 Q Have you testified in any litigation?  
3 A No.  
4 Q Are you still a member of the bar?  
5 A Yes.  
6 Q At some point, did you contact the Town of Stow  
7 concerning the possibility of TPL acquiring the  
8 property, the Kunelius property?  
9 A Yes.  
10 Q And do you recall when that was?  
11 A No.  
12 Q You have no idea at all as to when you may have  
13 initiated a discussion with them concerning TPL  
14 acquiring the property. Is that your testimony?  
15 MR. CONROY: Objection.  
16 MS. FETOUH: Objection.  
17 A My testimony is, for the third time, I don't remember  
18 when it happened.  
19 Q Do you remember, generally, when it happened?  
20 A After talking with Peter.  
21 Q But I'm talking about something different. So, maybe  
22 I'm being unclear. I didn't ask you when you  
23 initiated discussions concerning a conservation  
24 commission, I mean, a conservation restriction. I'm

- 33 -

1 asking you: when did you initiate discussions with  
2 the Town of Stow concerning TPL acquiring the Kunelius  
3 property?  
4 MR. CONROY: Objection.  
5 MS. FETOUH: Objection.  
6 MS. ECKER: Objection.  
7 A I'm not sure what you mean by acquiring the property.  
8 I mean, I don't distinguish -- I mean, my memory is  
9 that I had discussions with the town in the period of  
10 time after Peter Christianson brought this potential  
11 project to our attention. That's my memory.  
12 Q But you don't understand the term acquiring the  
13 property as I'm using it?  
14 A Well, the discussions weren't so much about acquiring  
15 as they were about how to do a potential conservation  
16 project out there.  
17 Q Did, using your term, doing a potential conservation  
18 project out there, involve acquiring some or all of  
19 the Kunelius property by TPL?  
20 A It may have or it may not have. At the beginning of a  
21 project, you don't pre-ordain what the outcome of the  
22 project is.  
23 Q But my question to you, sir, is: when did you discuss  
24 it where it did involve the acquiring of the property

- 34 -

1 by TPL?  
2 A Sometime after meeting with Peter.  
3 Q And would that be in 1999?  
4 A No. I don't recall.  
5 Q So, you do have some sense of, generally, when it was.  
6 Can you give me, plus or minus, a year? When did you  
7 do this?  
8 A Well, my memory is that this project occurred during  
9 the 2003 and 2004 period, generally. So, that  
10 suggests that these conversations took place during  
11 that time.  
12 (WHEREUPON, Exhibit No. 4, Stow annual  
13 report, 2003, marked for identification.)  
14 Q I've put before you a document which has been marked  
15 as Exhibit 4 and ask you if you've seen this before.  
16 A I believe I have.  
17 Q And on the first page -- by the way, this has a Bate  
18 stamp on it of KUN205 through 216. These are  
19 documents that were provided by the Town of Stow.  
20 That is their designation on the Bate stamp number.  
21 The first page of this document, which is  
22 Exhibit 4, has a picture of a horse on it and it  
23 says Town of Stow Annual Report, 2003, Red Acre  
24 Farm. Do you see that?

- 35 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEF by Kenson

1 A I do.  
 2 Q The second page indicates that this is a special town  
 3 meeting. It has a heading: Special Town Meeting,  
 4 2003, January 13, 2003. Do you see that?  
 5 A Yes.  
 6 Q Now, just looking at that, does that in any way assist  
 7 you as to whether or not you may have contacted the  
 8 Town of Stow in 2002 concerning the possibility of  
 9 acquiring the Kunelius property?  
 10 A Looking at Page 2?  
 11 Q Yes.  
 12 A Page 2 does not remind me.  
 13 Q Well, you see where it says there's a special town  
 14 meeting of January 13th?  
 15 A Yes.  
 16 Q Is it likely that a special town meeting dealing with  
 17 the Kunelius property, that you would have attended  
 18 such a meeting, if in fact you did, without first  
 19 making contact with the town prior to January 13,  
 20 2003?  
 21 MR. CONROY: Objection.  
 22 MS. FETOUH: Objection.  
 23 A Could I take a minute and just read this?  
 24 Q Well, actually, let me just direct you to a couple of

- 36 -

1 A The assignee.  
 2 Q And do you have an understanding of what this  
 3 paragraph is referring to or who the assignee would be  
 4 under this paragraph?  
 5 A TPL.  
 6 Q So, when TPL then becomes the assignee, sir, was it  
 7 your expectation that TPL would then purchase the  
 8 land?  
 9 MS. FETOUH: Objection.  
 10 A It was my expectation that we would live by the terms  
 11 of the contract.  
 12 Q No, was it your expectation that under the terms of  
 13 the assignment the only entity that could purchase the  
 14 land would be TPL?  
 15 A Correct.  
 16 Q Now, do you recall, having read this, when you would  
 17 have first discussed the possibility of TPL acquiring  
 18 the land by assignment? Strike that.  
 19 Do you recall when you discussed this with  
 20 the town officials, concerning TPL acquiring the  
 21 land by assignment, given the fact that this  
 22 representation appears to be sometime on January  
 23 13th of 2003?  
 24 MR. CONROY: Objection.

- 39 -

1 sections which may be helpful to you.  
 2 A Okay.  
 3 Q I'd like you to take a look on Page 95, also, marked  
 4 as KUN211. In the third full paragraph down, it says:  
 5 Craig MacDonald of the Trust for Public Land would  
 6 work with the Stow Conservation Trust and Friends of  
 7 Red Acre together with the selectmen with regard to  
 8 the Chapter 61A assignment. TPL would be the project  
 9 manager. Do you see that?  
 10 MR. CONROY: It's MacDonnell, by the  
 11 way.  
 12 MR. McLAUGHLIN: What did I say?  
 13 MR. CONROY: MacDonald.  
 14 MR. McLAUGHLIN: I'm sorry. I  
 15 apologize.  
 16 A I see that.  
 17 Q Does this suggest to you that you had contacted the  
 18 Town of Stow prior to January 13, 2003, in order to at  
 19 least discuss a Chapter 61 matter, 61A assignment?  
 20 A Yes.  
 21 Q And can you tell me what a 61A assignment would be?  
 22 A My understanding is that, under Mass. General Law,  
 23 Chapter 61A, there's a provision that authorizes  
 24 municipalities to assign rights of first refusal to

- 37 -

1 A Well, this paragraph would suggest to me that  
 2 conversations occurred prior to the town meeting.  
 3 Q Is it likely that TPL met with the town in December of  
 4 2002 concerning this issue of a possible of assignment  
 5 of the right of first refusal?  
 6 MR. CONROY: Objection.  
 7 MS. FETOUH: Objection.  
 8 A Well, what I can say is that TPL did meet with town  
 9 officials prior to January 13th.  
 10 Q Was it you that met with the town officials prior to  
 11 January 13th?  
 12 A I believe so.  
 13 Q And who did you meet with?  
 14 A There were many meetings between myself and municipal  
 15 officials regarding this project over many months, and  
 16 so I guess there were maybe seventy-five or a hundred  
 17 meetings over the period of this project. So, for me  
 18 to remember how who was at any one meeting is  
 19 difficult, but I do remember there were a series of  
 20 meetings.  
 21 Q You don't remember who was at the first meeting, the  
 22 introductory meeting. Is that your testimony?  
 23 A Correct.  
 24 Q You don't remember where the introductory meeting was.

- 40 -

1 conservation organizations.  
 2 Q And do I understand it correctly that this reference  
 3 is referring to the possible assignment of the right  
 4 of first refusal to TPL?  
 5 A This paragraph?  
 6 Q Uh-huh.  
 7 A Yes, I believe that would be the case.  
 8 Q So, this is referring to -- it's also referring to TPL  
 9 would be the project manager. What does that mean?  
 10 MR. CONROY: To whom?  
 11 MR. McLAUGHLIN: I don't know. That's  
 12 what it says. What does it mean to him?  
 13 A What does that mean to me?  
 14 Q Yeah.  
 15 A It means that we would manage the conservation  
 16 project.  
 17 Q And would you manage the assignment?  
 18 MS. FETOUH: Objection.  
 19 A We would help the town accomplish the assignment.  
 20 Q And when the assignment occurs, who has the right to  
 21 purchase the property under the terms of an  
 22 assignment?  
 23 MR. CONROY: Objection.  
 24 MS. FETOUH: Objection.

- 38 -

1 Is that right?  
 2 A I don't.  
 3 Q You don't recall whether it was the Board of  
 4 Selectmen. Is that correct?  
 5 A I do not.  
 6 Q You don't remember whether the meeting was in your  
 7 office or in the Town of Stow.  
 8 A I don't remember the first meeting.  
 9 Q Do you remember the second meeting?  
 10 A No.  
 11 Q In your role as director, who would you normally  
 12 contact from a town when initiating discussions  
 13 concerning a Chapter 61A assignment?  
 14 MS. FETOUH: Objection.  
 15 A I would be interested in talking to the Board of  
 16 Selectmen.  
 17 Q But you don't know in this case whether you contacted  
 18 the Board of Selectmen?  
 19 A I do not recall.  
 20 Q Who else in the Town of Stow would you have contacted  
 21 in order to initiate discussions on a Chapter 61A  
 22 assignment?  
 23 MS. FETOUH: Objection.  
 24 MR. CONROY: Might he have contacted?

- 41 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 MR. McLAUGHLIN: Yeah.  
 2 A Well, what I can say is, normally, in a 61A project, I  
 3 like to talk to people on the Conservation Commission.  
 4 I like to talk to people on the CPC and on the  
 5 Planning Board and other municipal committees. The  
 6 objective is to get a feel for the possibility of the  
 7 project by talking to as many people as possible, and  
 8 because TPL has many projects going in every year,  
 9 there are hundreds of these meetings that occur, have  
 10 occurred, since 2002.  
 11 Q You described having seventy-five or a hundred  
 12 meetings with the town officials from the initiation  
 13 of the possibility of an assignment of the Chapter 61A  
 14 exercise of right of first refusal to --  
 15 A I'd like to clarify that. I'd say discussions,  
 16 probably not meetings but discussions.  
 17 Q Okay. The span of time from the initiation, perhaps  
 18 sometime before January 13, 2003, to the end of the  
 19 hundredth meeting was approximately what date?  
 20 MS. FETOUH: Objection.  
 21 A Well, I'm not saying there were a hundred meetings. I  
 22 said I've had between seventy-five and a hundred  
 23 discussions.  
 24 Q Okay.

- 42 -

1 A And that's a ball-park. So, your question is?  
 2 Q Well, over what span of time did you have these  
 3 discussions and/or meetings, beginning with --  
 4 A The course of the whole project.  
 5 Q At some point, is it fair to say you actively began  
 6 lobbying for the possibility of accepting an  
 7 assignment of the 61A right of first refusal?  
 8 MR. CONROY: Objection.  
 9 MS. FETOUH: Objection.  
 10 A Lobbying to whom?  
 11 Q To the town.  
 12 A It is fair that at some point it made sense to TPL  
 13 that, for the project to go forward, the way that  
 14 would occur is via an assignment of the right of first  
 15 refusal.  
 16 Q And at some point did you begin any process of  
 17 convincing the town that that was the way the project  
 18 should go?  
 19 A Well, I had a number of discussions, the place and  
 20 time of which I can't recall right now, with various  
 21 town officials about how to go forward, how to do  
 22 this, and we certainly talked about Chapter 61A among,  
 23 you know, a whole host of other issues.  
 24 Q And when you would have these discussions, do you ever

- 43 -

1 recall discussions with a political body, such as the  
 2 entire Board of Selectmen?  
 3 A Yes.  
 4 Q And how often did you meet with the entire Board of  
 5 Selectmen?  
 6 A I don't recall the frequency. I think it was a number  
 7 of times that I met with the whole board.  
 8 Q Did you meet with them during official Board of  
 9 Selectmen hearings or privately?  
 10 A I met with them during regularly scheduled meetings,  
 11 and I believe I had conversations with individual  
 12 members outside of those meetings.  
 13 Q Do you know approximately when you met with the Board  
 14 of Selectmen in official meetings?  
 15 A No.  
 16 Q Can you tell me approximately when you did that?  
 17 A Not with reference to a date. I mean, I believe that,  
 18 in order to accomplish the assignment, there were  
 19 meetings with the Board of Selectmen in advance of the  
 20 actual assignment. So, you know, in relation to other  
 21 events, I can remember it, but I don't have dates in  
 22 mind.  
 23 Q Do you recall when the assignment took place?  
 24 A I believe it was in 2003.

- 44 -

1 (WHEREUPON, Exhibit No. 5, Stow letter  
 2 with attachments to Kunelius, dated February 12,  
 3 2003, marked for identification.)  
 4 Q I've put before you what has been marked as Exhibit 5  
 5 and ask you if you've seen that before.  
 6 A Yes, I believe I have.  
 7 Q Now, for the record, this is a compilation of  
 8 documents as received from the Town of Stow. So, they  
 9 were stapled together in this matter when we received  
 10 them and I've left them that way. The first page is  
 11 KUN474. It is a February 12th letter to Marilyn  
 12 Kunelius from the Board of Selectmen. The second one  
 13 is an assignment and acceptance, and that's 476,  
 14 signed by three members of the Board of Selectmen.  
 15 And the third page is an acceptance of assignment,  
 16 which is 478, and that is signed by Dorothy Nelson  
 17 Stuckey, regional counsel, Trust for Public Land.  
 18 Now, does this exhibit, number five, assist  
 19 you in getting a sense of when the assignment  
 20 took place?  
 21 A It does.  
 22 Q And the first page of Exhibit 5 is a notice from the  
 23 Town of Stow to Marilyn Kunelius that they are  
 24 assigning the right of first refusal to the Trust for

- 45 -

1 Public Land. Do you see that?  
 2 A I do.  
 3 Q And you've seen this before. Is that correct?  
 4 A Yes.  
 5 Q And this is copied to Dorothy Nelson Stuckey, Trust  
 6 for Public Land, on the cc: line. Is that correct?  
 7 A Yes.  
 8 Q And does she remain counsel for the Trust for Public  
 9 Land?  
 10 A Yes.  
 11 Q And that was on February 12th of 2003. Is that  
 12 correct?  
 13 A Exhibit 5 is dated February 12th.  
 14 Q And the last page of Exhibit 5 is an acceptance of the  
 15 assignment signed on February 12, 2003. Do you recall  
 16 that?  
 17 A Do I recall the acceptance?  
 18 Q I'm sorry. Am I correct there?  
 19 A Well, I see the last page of Exhibit 5.  
 20 Q Okay. Now, were you at any meeting of the Board of  
 21 Selectmen when they voted to assign the rights to TPL?  
 22 A I believe I was.  
 23 Q And do you recall when that meeting was?  
 24 A No.

- 46 -

1 Q Was Dorothy Stuckey with you at that meeting with the  
 2 Board of Selectmen when they voted to assign the right  
 3 of first refusal to you, to TPL?  
 4 A Don't believe so.  
 5 Q Well, I note that both are dated the same date,  
 6 February 12th. Do you see that?  
 7 A Page 3 being -- or --  
 8 Q Well, if we look at the date of the letter, first page  
 9 of Exhibit 5, February 12, 2003, and if you look at  
 10 the acceptance, it's dated the same day. Would that  
 11 suggest that she was with you at a meeting concerning  
 12 the acceptance?  
 13 A Not necessarily.  
 14 Q So, you don't remember whether she was even with you  
 15 at the meeting of the Board of Selectmen when the  
 16 assignment was made?  
 17 MS. FETOUH: Objection, asked and  
 18 answered.  
 19 A My recollection is that she was not.  
 20 Q And did you have the authority, at the time of the  
 21 vote to assign it to TPL, to accept on behalf of TPL  
 22 that assignment?  
 23 A Are you asking whether, as Massachusetts state  
 24 director, I had the authority to do that?

- 47 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 Q Yeah.  
 2 A I don't know whether I had the authority to do it.  
 3 Let me clarify that. I believe the Trust for Public  
 4 Land had considered this and had voted to accept the  
 5 assignment and, by that vote, essentially authorize  
 6 Dorothy Stuckey to sign that acceptance.  
 7 Q And was that a vote of the Board of Directors of TPL?  
 8 A It was a vote of the Project Review Committee of the  
 9 Board of Directors.  
 10 Q And is that of the national Board of Directors or is  
 11 there --  
 12 A There is only one Board of Directors.  
 13 Q So, the Project Review Committee voted to accept the  
 14 assignment?  
 15 A Correct.  
 16 Q And it's that vote that authorized Dorothy Stuckey to  
 17 accept on behalf of TPL?  
 18 A Correct.  
 19 Q And it is likely, therefore, that the vote occurred  
 20 prior to her accepting the assignment? Is that  
 21 correct?  
 22 A It is likely.  
 23 Q I'm going to put before you another document. Do you  
 24 have a sense, prior to doing that, when they voted?

- 48 -

1 Would they have voted a week before, a day before?  
 2 A I do not know.  
 3 (WHEREUPON, Exhibit No. 6, MacDonnell  
 4 letter to Perry, dated February 11, 2003, marked  
 5 for identification.)  
 6 Q I've put before you a document that we received from  
 7 the Town of Stow. This has been marked as Exhibit 6.  
 8 It's a February 11, 2003, letter to Ross Perry from  
 9 Craig MacDonnell, Massachusetts state director. Do  
 10 you recognize this?  
 11 A I do.  
 12 Q Is that your signature?  
 13 A Yes.  
 14 Q Now, this is dated the day before the vote to assign  
 15 to TPL, is that correct?  
 16 MS. FETOUH: Objection.  
 17 A It's dated February 11th.  
 18 Q And this is the day before Dorothy Stuckey accepted  
 19 the assignment, correct?  
 20 MR. CONROY: Objection.  
 21 A The day before the 12th, which is the date next to  
 22 Dorothy's signature on Exhibit 5.  
 23 Q So, it's the day before she accepted the assignment.  
 24 Is that fair to say?

- 49 -

1 MR. CONROY: Objection.  
 2 MS. FETOUH: Objection.  
 3 A Well, since I don't have a recollection independent of  
 4 these documents, what happened in what sequence, all I  
 5 can do is sort of agree with you that those two dates  
 6 are one after another.  
 7 Q Looking at the first paragraph of Exhibit 6, well,  
 8 strike that.  
 9 Do you have a recollection of why you sent  
 10 this letter to Ross Perry?  
 11 A I need to take a minute and read this. Okay. Your  
 12 question?  
 13 Q Is it fair to say this was a letter from you  
 14 establishing what the terms were that would have to be  
 15 met by the town in order for TPL to accept the  
 16 assignment of the right of first refusal?  
 17 A It was a proposal to that effect, yes.  
 18 Q And did the town meet your proposal?  
 19 A I believe they did.  
 20 Q And that resulted in the assignment the next day. Is  
 21 that correct?  
 22 MS. FETOUH: Objection.  
 23 A I believe it resulted in the assignment. I don't have  
 24 independent recollection of the date that it actually

- 50 -

1 occurred.  
 2 (WHEREUPON, Exhibit No. 7, Conditions  
 3 for right of first refusal, marked for  
 4 identification.)  
 5 Q I am going to put before you the next document,  
 6 Exhibit 7. Do you recognize this document?  
 7 A I don't.  
 8 Q Do you recall this document -- well, let me suggest to  
 9 you that there are numerous copies of this document in  
 10 the Town's production which indicate that this is  
 11 something that was sent to you seeking answers to the  
 12 questions outlined, or the statements outlined, in two  
 13 pages.  
 14 MS. FETOUH: Objection.  
 15 Q Does that in any way refresh your memory?  
 16 A That by itself doesn't, no.  
 17 Q This document appears -- it's an unsigned document  
 18 that has a signature line for Ross Perry. Do you see  
 19 that on the second page?  
 20 A Yes.  
 21 Q Do you recall Ross Perry discussing with you topic  
 22 number two on the front page of Exhibit 7? And for  
 23 the record, the second item on the first page is:  
 24 Town is held harmless if TPL backs out of deal before

- 51 -

1 closing. In other words, TPL will defend the town  
 2 against any suit resulting from the failure of the  
 3 property purchase to be completed. Alternatively, TPL  
 4 posts a bond that guarantees their performance.  
 5 A I remember discussing this issue with the board as a  
 6 whole. I don't remember having an individual  
 7 discussion with Ross Perry about it.  
 8 Q What do you remember about that discussion?  
 9 A I remember the issue of indemnification coming up in  
 10 the Board of Selectmen's meeting.  
 11 Q And what do you recall about the indemnification issue  
 12 at the Board of Selectmen meeting?  
 13 MR. CONROY: Hold on one minute. Go  
 14 ahead.  
 15 A I remember it was discussed in the open meeting.  
 16 MR. CONROY: That having been asked and  
 17 answered, can I just have a minute with counsel?  
 18 MR. McLAUGHLIN: Sure.  
 19 (Brief recess held)  
 20 MR. McLAUGHLIN: Can you repeat the  
 21 question? I don't even remember what it was.  
 22 (Question and answer read back)  
 23 Q Can you tell me what you remember about the  
 24 indemnification issue during the meeting at the Board

- 52 -

1 of Selectmen?  
 2 A Yes.  
 3 Q Go ahead.  
 4 A I remember the issue was discussed. William Wrigley  
 5 raised the issue, asked if TPL would indemnify. I  
 6 told the board we would not.  
 7 Q Is that your recollection?  
 8 A Yes.  
 9 Q Do you recall why they were asking for  
 10 indemnification?  
 11 MR. CONROY: Objection.  
 12 MS. FETOUH: Objection.  
 13 MR. McLAUGHLIN: Strike that.  
 14 Q Do you recall whether they told you why they were  
 15 asking for the indemnification?  
 16 A I don't.  
 17 Q Do you recall whether they asked you whether TPL had  
 18 the money to make the purchase under the terms of the  
 19 right of first refusal?  
 20 A I don't.  
 21 Q Do you recall telling TPL, I'm sorry, do you recall  
 22 telling the Board of Selectmen that TPL did have the  
 23 money necessary to make the purchase?  
 24 A No.

- 53 -



## DEPOSITION OF CRAIG MACDONNELL

1 Q You do not recall telling them that. Do you know  
2 whether TPL did have the money to make the purchase at  
3 the time that you met with the Board of Selectmen on,  
4 I presume, February 11th or 12th?  
5 A I'm not sure I know what you mean by have the money.  
6 Q Did you have the funds necessary to complete the  
7 purchase?  
8 A No, not in hand.  
9 Q What was the source of the money that would allow TPL  
10 to make the purchase under the terms of the right of  
11 first refusal?  
12 A I believe it was a combination of sources, including  
13 the Town of Stow, a hoped for private sale of a part  
14 of Mrs. Kunelius' property and private fund-raising.  
15 Q Any state money?  
16 A There was the hope for a grant.  
17 Q Okay. Let's go back to Exhibit No. 6 for a moment.  
18 On the first page of No. 6, there's a reference to  
19 \$100,000 for affordable housing and 300,000 for open  
20 space. Is that correct?  
21 A I see that.  
22 Q And is that the amount that you were looking for when  
23 you referred to the source of money from the Town of  
24 Stow?

- 54 -

1 A Yes.  
2 Q So, there's \$400,000 there.  
3 A Correct.  
4 Q Did TPL ever receive any of that money?  
5 A No.  
6 Q The second reference you made was the hoped for  
7 private sale. And I would ask you to look at the same  
8 Exhibit 6, and it refers to deeds from private  
9 parcels. Is that correct?  
10 A I see those words.  
11 Q And is that what you were referring to when you said  
12 that a source of the money would be hoped for private  
13 sales?  
14 A Well, the intention was to subdivide Mrs. Kunelius'  
15 land into three portions, one for the town and two  
16 lots that would be sold privately, the two lots we  
17 referred to as 142 and 144. So, the hope was to sell  
18 those two lots, 142 and 144, on the private market and  
19 raise funds for Mrs. Kunelius.  
20 Q And raise funds. Where on Exhibit 6 does it discuss,  
21 as a requirement of accepting the assignment, that  
22 funds would have to be raised?  
23 MS. FETOUH: Objection.  
24 MR. CONROY: Objection.

- 55 -

1 A Well, the four hundred thousand are funds that would  
2 need to be raised.  
3 Q So, the \$400,000 of funds we've already discussed in  
4 the funds to be raised by the Town of Stow, I thought.  
5 Am I incorrect there?  
6 A No. No, you're correct.  
7 Q And so then there's \$400,000. And then you hoped for  
8 funds from the private sale of one or two of the lots.  
9 Am I correct there?  
10 A Both lots, sale of both lots.  
11 Q And does it say anywhere in Exhibit 6 how much money  
12 that would be, would be derived from the sale of the  
13 two lots?  
14 A I don't believe so.  
15 Q So, you didn't make, as a requirement of the  
16 acceptance of the right of first refusal, a specific  
17 dollar amount that would have to be derived from the  
18 hoped for private sale, is that correct?  
19 A In this letter, no.  
20 Q And between the date of this letter, January 11th, and  
21 the acceptance --  
22 MS. FETOUH: February 11th?  
23 Q I'm sorry, February 11, 2003, and the acceptance on  
24 February 12, 2003, in which Dorothy Stuckey on behalf

- 56 -

1 of TPL accepted the assignment, are you aware of any  
2 other document that would have outlined additional  
3 requirements of TPL necessary for TPL to accept the  
4 assignment?

5 A As I sit here this morning, no.  
6 Q Now, the private funding, let's get back to the  
7 private funding that you referred to, private funding,  
8 private fund-raising. Where does your letter of  
9 February 11th, Exhibit 6, refer to that private fund-  
10 raising?

MR. CONROY: Objection.

MS. FETOUH: Objection.

13 A I don't believe it does.  
14 Q And are you aware of any other document between  
15 February 11th and February 12th of 2003 that  
16 established, as a condition for the acceptance of the  
17 assignment, that private fund-raising would be a  
18 necessary component of the acceptance?  
19 A As I sit here this morning, no.  
20 Q Looking at the last page of Exhibit 6, there's a  
21 paragraph that states: Under these circumstances, TPL  
22 will entertain acceptance of the ROFR. All in  
23 caps. Right of first refusal is what that means.  
24 Is that correct?

- 57 -

1 A Yes.  
2 Q Upon acceptance, TPL, quote, steps into the shoes,  
3 unquote, of the buyer and is bound by the applicable  
4 terms of the contract. Have I read that correctly?  
5 A You have.  
6 Q What did you mean by applicable terms?  
7 A I meant the terms that the common law would require  
8 TPL to meet.  
9 Q And what do you mean by common law? What terms would  
10 the common law require?  
11 MR. CONROY: Objection.  
12 A I mean decisions of the Massachusetts courts under  
13 Chapter 61A.  
14 Q And in fact, at that point, did you not have an  
15 understanding that there were no decisions concerning  
16 what terms would necessarily be applicable and what  
17 terms would not?  
18 MS. FETOUH: Objection.  
19 MR. CONROY: Objection.  
20 A My understanding was that courts would apply some  
21 terms and not other terms.  
22 Q And did you have an understanding of what those terms  
23 were that would be applicable and what terms would not  
24 be applicable?

- 58 -

1 A My understanding was that the terms that would  
2 naturally make sense for an assignee to abide by would  
3 apply.  
4 Q So, in your mind, when you wrote Exhibit 6, you had an  
5 understanding that some of the terms of the contract  
6 were applicable to the assignment and some were not.  
7 Is that correct?  
8 A Basically.  
9 Q Do you recall being asked by the Town of Stow to  
10 identify what terms you thought were applicable and  
11 what terms you did not think were applicable?  
12 A No.  
13 MR. CONROY: Somewhere in here, Mike,  
14 I'd like to take a five-minute break if we could.  
15 MR. McLAUGHLIN: Sure. That would be  
16 good. It's now 11:30. We'll take a break; 531  
17 for the ladies room, is the code, and then why  
18 don't we go, say, to 12:30. There's a cafeteria  
19 downstairs that's not bad. Oh, you know that.  
20 MR. CONROY: So I hear.  
21 MR. McLAUGHLIN: Cafeteria downstairs  
22 is not bad, and we can take like a half hour if  
23 that's all right.  
24 (Recess, 11:30 A.M.)

- 59 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 (After recess, 11:44 A.M.)  
 2 THE WITNESS: Are we still on Exhibit 6  
 3 here?  
 4 MR. McLAUGHLIN: We're still on  
 5 Exhibit 6, yeah.  
 6 THE WITNESS: All right.  
 7 Q Just so I understand, when you refer to the language  
 8 on Exhibit 6, on the last page, where it says, "Upon  
 9 acceptance, TPL steps into the shoes of the buyer and  
 10 is bound by the applicable terms of the contract,"  
 11 have I understood you correctly that you believed that  
 12 there were terms that you did not have to abide with  
 13 in the contract, or comply with in the contract, when  
 14 you wrote this letter?  
 15 A By that sentence, I meant to convey my general  
 16 understanding about an assignee's obligation under  
 17 Chapter 61. As a general matter, I did not have in my  
 18 mind at that time a particular term, if that's what  
 19 you're asking, that would not apply.  
 20 Q Okay.  
 21 A But while we're on that sentence, I'd like to clarify  
 22 something I said earlier about this letter not  
 23 referencing any other financing that was required.  
 24 The next sentence in that paragraph, where I

- 60 -

1 wrote, "TPL is ready to work hard to assemble the  
 2 finances required to make the seller whole," by  
 3 that sentence, I meant that there was a lot of  
 4 work to do to bring the finances to the table,  
 5 including town money, private sale money and  
 6 private fund-raising.  
 7 Q So, the reader of the sentence that you just read, TPL  
 8 is ready to work hard to assemble the finances  
 9 required to make the seller whole, the reader of that  
 10 would have to know that it involved some private fund-  
 11 raising as well. Is that your testimony?  
 12 MS. FETOUH: Objection.  
 13 MR. CONROY: Objection.  
 14 A Not really. I'm just trying to tell you what I meant  
 15 by that so I could answer your earlier question more  
 16 completely. It's that sentence that is sort of the  
 17 textual reference to some of the things that we talked  
 18 about between TPL and the town in the meetings that  
 19 we've referred to.  
 20 Q So, on February 11th, the day before the acceptance of  
 21 the right of first refusal by TPL, is it your  
 22 testimony that you did not have specific terms of the  
 23 contract which you believed would allow you to not  
 24 perform under the contract?

- 61 -

1 MS. FETOUH: Objection.  
 2 MR. CONROY: Objection.  
 3 A No, what I said was a little different than that.  
 4 What I meant to say was that, by using that sentence,  
 5 I was saying that, under Chapter 61, there are terms  
 6 of a contract that apply to an assignee and that,  
 7 depending on the circumstances, there are others that  
 8 don't apply.  
 9 Q So, based on the fact that you're an attorney and you  
 10 profess to know Chapter 61, can you tell me what terms  
 11 you think apply?  
 12 MS. FETOUH: Objection.  
 13 MR. CONROY: Objection. Let me say,  
 14 Mike, if I may, for the record, I have some  
 15 concern about Mr. MacDonnell being asked to  
 16 testify, effectively, as an expert, as a legal  
 17 expert. I think it's fair game to ask him what  
 18 was in his mind when he did what he did and how  
 19 that may have influenced him, but for him to be  
 20 asked to testify in general as to the meaning of  
 21 the law, I think is inappropriate. So, I object  
 22 on that basis.  
 23 MR. McLAUGHLIN: Okay. But I'm not  
 24 going to change the question.

- 62 -

1 Q As an attorney, you have some understanding of  
 2 Chapter 61.  
 3 MR. CONROY: Excuse me. I will just  
 4 not repeat that.  
 5 MR. McLAUGHLIN: No, I understand.  
 6 MR. CONROY: But throughout the  
 7 deposition, I have that standing objection, okay?  
 8 MR. McLAUGHLIN: Yes.  
 9 MR. CONROY: Is that acceptable?  
 10 MR. McLAUGHLIN: That's acceptable.  
 11 Q Can you tell me, based upon your understanding of the  
 12 fact that, under Chapter 61, there are terms of a  
 13 contract that apply and terms of a contract that don't  
 14 apply, please tell me what terms apply.  
 15 MS. FETOUH: Objection.  
 16 A Because I don't have this contract in my mind as we're  
 17 talking about it, I can only tell you that sort of as  
 18 an example of a kind of a term that I don't think  
 19 would apply, a Chapter 61A contract that imagines a  
 20 full-scale development process whereby the purchaser  
 21 gets permits. Those kinds of provisions would sort of  
 22 be inapposite for an assignee to comply with under  
 23 Chapter 61.  
 24 Q And so, for example, under the terms of the contract

- 63 -

1 in question, which anticipated a 40B development, you  
 2 did not feel compelled to put up a 40B development as  
 3 the assignee of the right of first refusal. Is that  
 4 fair to say?  
 5 A For example.  
 6 Q Yeah, okay. Do you recall ever meeting with the Town  
 7 of Stow Community Preservation Committee?  
 8 A Yes.  
 9 Q I'm going to put before you what will be marked as  
 10 Exhibit 8.  
 11 (WHEREUPON, Exhibit No. 8, minutes of  
 12 Stow CPC meeting, February 10, 2003, marked for  
 13 identification.)  
 14 Q And these are provided to us from the Town of Stow. I  
 15 note that they are doubled. They're printed on both  
 16 sides. I'm going to just have you look at one small  
 17 part of this document, and it's on the second page,  
 18 which is marked as 039, and it's a -- by the way, this  
 19 document is called Minutes of Meeting of February 10,  
 20 2003, and it says a committee member asked what  
 21 happens if CPC votes in favor and gets voted down at  
 22 the town meeting. TPL responded that they would be  
 23 under contract at that point and would have to make it  
 24 work. Do you recall whether the person that said that

- 64 -

1 for TPL was you?  
 2 MR. CONROY: Objection.  
 3 MS. FETOUH: Objection.  
 4 A I recall discussing this issue at a meeting of CPC. I  
 5 don't know whether it was on February 10th.  
 6 Q February 10th would have been two days before the  
 7 assignment. Does that in any way refresh your  
 8 recollection?  
 9 A It would make sense.  
 10 Q And it would make sense that you were the person at  
 11 that point that would have been attending the  
 12 Community Preservation Committee meeting.  
 13 A Yes.  
 14 Q Given that, what did you mean when you said that TPL  
 15 would be under contract at that point and would have  
 16 to make it work?  
 17 A I don't know if I've testified that I actually said  
 18 that. I remember discussing it.  
 19 Q Do you have reason to believe that the minutes of the  
 20 meeting of February 10th of the Preservation Committee  
 21 are inaccurate with regard to this paragraph that I've  
 22 just read?  
 23 A I have no reason to think they are accurate or  
 24 inaccurate.

- 65 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 Q Well, you have no reason to believe that it's accurate  
2 or inaccurate?  
3 A I don't know anything about this document. I've seen  
4 it here this morning for the first time. So, I don't  
5 know anything about it.  
6 Q Well, let's go back. The document, Exhibit 8,  
7 purports to be minutes of a meeting of February 10th.  
8 Do you see that?  
9 A I do.  
10 Q And it's your testimony that you likely attended that  
11 meeting since it was two days before the assignment.  
12 A Yes.  
13 Q And so is your testimony that you have no comment as  
14 to the accuracy of the statement that TPL responded  
15 that they would be under contract at that point and  
16 would have to make it work? You have no comment as to  
17 whether that is inaccurate or accurate?  
18 A I just don't have a recollection of saying that,  
19 that's all.  
20 Q Do you remember being asked the question?  
21 A I don't remember being asked the question.  
22 Q Do you remember questions concerning what happens if  
23 the town meeting votes down this project?  
24 A I don't.

- 66 -

1 Q Did in fact the town vote down the project?  
2 A No.  
3 Q Did the town have a vote to buy the project?  
4 A Yes.  
5 Q And it passed?  
6 A Correct.  
7 Q Is it fair to say, sir, that you were involved  
8 extensively in the drafting of a warrant for the town  
9 for a town meeting?  
10 A I remember participating in the drafting of a warrant  
11 article in Stow.  
12 Q And is it fair to say that that warrant involved the  
13 town purchasing the Kunelius property?  
14 A Yes.  
15 Q And is it fair to say that the town voted and they  
16 voted down the purchase?  
17 A My memory is they voted to approve that.  
18 Q Let's go back to Exhibit 6 for a second. Looking at  
19 Exhibit 6, which is right here, did you ever tell  
20 anyone that if you didn't get the town financial  
21 commitment of \$400,000 that it didn't matter? You  
22 were going to buy the property anyhow under the  
23 assignment of right of first refusal.  
24 A I don't remember that.

- 67 -

1 Q Is it likely that you would have said that?  
2 MR. CONROY: Objection.  
3 A I don't know how to answer the is-it-likely question.  
4 Q Was the \$400,000 that is referred to in Exhibit 6 a  
5 requirement of TPL's acceptance of the assignment?  
6 MS. FETOUH: Objection.  
7 A No.  
8 Q So, if you didn't get the \$400,000, you were still  
9 going to accept the assignment. Is that correct?  
10 A Well, I believe the vote to authorize the expenditure  
11 post-dated the assignment. So, the decision whether  
12 to accept the assignment would occur before that would  
13 happen.  
14 Q Is it also true that if you didn't get the, quote,  
15 hoped for sale of the two parcels that that was not  
16 critical in whether or not you would accept the  
17 assignment?  
18 MS. FETOUH: Objection.  
19 MR. CONROY: Objection.  
20 A Well, likewise, the proposed sale of 142 and 144 Red  
21 Acre Road were going to post-date the assignment, so  
22 we would not have known then whether in fact those  
23 parcels would have sold. It would be later in time.  
24 Q Did you tell the Community Preservation Commission

- 68 -

1 that it didn't matter whether you got the four hundred  
2 thousand from the town or whether you sold off  
3 portions of the property; you would still purchase the  
4 property?  
5 A I don't recall that.  
6 Q Do you recall telling that to anyone?  
7 A It not mattering --  
8 Q Yeah.  
9 A -- is your question? I don't recall using that --  
10 Q Did it matter? In other words, if the money wasn't  
11 given to TPL from the town, \$400,000, and if you  
12 couldn't sell the two lots, did you tell anyone that  
13 it didn't matter because TPL would purchase the  
14 property and pay the full asking price?  
15 A That's what I don't recall. I don't recall using that  
16 language.  
17 Q My question to you is: is that a fact that it didn't  
18 matter to TPL, that they were going to purchase it  
19 anyhow?  
20 A It was our complete and absolute intention to do this  
21 project and conserve this property and buy this  
22 property from Marilyn Kunelius. It's our business to  
23 do this. The reason I changed careers was to be  
24 involved in the environmental field. This is why I

- 69 -

1 work at TPL. This is why we do this stuff. We fully  
2 intended -- from the very second we looked at this  
3 project, we would never have accepted the assignment  
4 unless we fully intended to do this.  
5 Q So, the answer --  
6 A Yes, the answer is we fully intended to buy this  
7 property.  
8 Q And what was your source of funds in the absence of  
9 the \$400,000 and the absence of the sale of parcels  
10 and in the absence of fund-raising? What would be the  
11 source of the funds that you would purchase the  
12 property with?  
13 MR. CONROY: Objection.  
14 MS. FETOUH: Objection.  
15 A We did not contemplate being able to do this project  
16 without finding adequate financial sources external to  
17 TPL to complete it.  
18 Q You never considered that?  
19 A What we considered was, as we consider in all our  
20 projects, is advocating as hard as we can for public  
21 money, if necessary for private sale money, and if  
22 necessary for private fund-raising money, and working  
23 as hard as we can to put that money together as we  
24 have in every one of our 61 projects in Massachusetts,

- 70 -

1 and so we fully intended that the sources we had  
2 identified would come together and that we would be  
3 able to purchase this property.  
4 Q And did you consider what your obligations would be to  
5 Marilyn Kunelius if those sources did not pan out?  
6 MS. FETOUH: Objection.  
7 A Yes.  
8 Q And how did you consider dealing with that  
9 possibility?  
10 A We looked at the contract.  
11 Q You didn't consider any other assets or sources of  
12 funds, other than the three that we've already  
13 discussed, the money from the Town of Stow, sale of  
14 the private lots and fund-raising?  
15 A The obligation that TPL had was measured by the  
16 contract. So, it's natural for us to look at the  
17 contract to figure out what the scope of the  
18 obligation was, which is what we did.  
19 Q So, you looked at the contract. And is it fair to say  
20 you determined that, if we don't get the money from  
21 the Town of Stow and if we don't get the private sale  
22 from the two lots and we don't get fund-raising, then  
23 we'll claim that we don't have to purchase the  
24 property because of the liquidated damage clause? Is

- 71 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 that correct?

2 MS. FETOUH: Objection.

3 A We read the liquidated damages clause and believed it

4 would apply in this case and -- well, I'll leave it at

5 that.

6 Q And you made that determination prior to the

7 acceptance of the assignment. Is that correct?

8 A Correct.

9 Q And that was because just the normal prudence would

10 suggest that you would have to have some contingency

11 for the possibility that you wouldn't have the town

12 financing, you wouldn't have the sale of the lots, and

13 you wouldn't have money from fund-raising. Your

14 normal procedure, due diligence and prudence, would

15 suggest that you would have to have some way to deal

16 with that, correct?

17 MR. CONROY: Objection.

18 MS. FETOUH: Objection.

19 A It's true that, when we scope a project, we look at

20 our legal obligations and make decisions in accordance

21 with them, absolutely.

22 Q And did you ever tell the Town of Stow prior to the

23 acceptance of the assignment, the right of first

24 refusal, that if you failed to accomplish obtaining

- 72 -

1 money from the Town of Stow or from obtaining the

2 deeds or from fund-raising or selling property from

3 the deeds, that you would rely on the liquidated

4 damage clause and not purchase the property?

5 A Did I tell the Town of Stow?

6 Q Yes.

7 A About our analysis of the --

8 Q Yes.

9 A At some point, yes.

10 Q Prior to the time that you accepted the assignment,

11 did you tell them?

12 A I don't remember when I had that discussion.

13 Q Is there anything in Exhibit 6 that outlines,

14 specifically, that you intended to rely on the

15 liquidated damage clause if necessary?

16 MR. CONROY: Objection.

17 A Well, not explicitly. The sentence where I say that

18 we are bound by the applicable terms of the contract

19 is a summary, really, of normal Chapter 61 legal

20 analysis, which includes all of those terms.

21 Q Do you recall telling any public officials from the

22 Town of Stow that TPL had never failed at any time to

23 honor an assignment of a right of first refusal?

24 A Yes, I believe I did say that.

- 73 -

1 Q And, in fact, do you remember telling public officials

2 of the Town of Stow that they had nothing to worry

3 about regarding indemnification because TPL, having

4 never failed, would find a way to purchase the

5 property to make Mrs. Kunelius whole?

6 A I remember discussing this issue with the town. I

7 don't recall the language I used.

8 Q But you do recall that you told the town that TPL had

9 never failed in the past to honor an assignment of a

10 right of first refusal.

11 A I do remember that, and I believe we honored it here.

12 Q So, I don't want to belabor a point, but I'm a little

13 confused. On one hand I thought you said that you had

14 every intention of going forward and purchasing the

15 property even if the three items outlined in your

16 letter of February 11th, Exhibit 6, were not achieved.

17 MR. CONROY: Objection.

18 Q And on the other hand you say that if you did not

19 achieve the three items on Exhibit 6, i.e., the money

20 from the town, the sale of private lots, the two

21 private lots, and fund-raising, that you would look to

22 the liquidated damage clause. So, which is it?

23 MR. CONROY: Objection.

24 MS. FETOUH: Objection.

- 74 -

1 MS. ECKBER: Objection.

2 Q Was the intention to go forward even if you didn't

3 have the three requirements that are outlined on

4 Exhibit 6, or was it your intention to rely on the

5 liquidated damage clause?

6 MR. CONROY: Objection.

7 MS. FETOUH: Objection.

8 A It was our intention at the beginning and throughout

9 most of this project to close no matter what because

10 that's the way TPL does its business, believing fully

11 that it would be possible to do so. It became

12 apparent at some point, despite all of our good

13 efforts, that the public and private money was not

14 going to make it to the table, and it was only after

15 realizing that there was, what TPL concluded was, an

16 unbridgeable gap between the money that was available

17 and the money that was needed that it became

18 impossible to go forward.

19 (WHEREUPON, Exhibit No. 9, printout of

20 TPL Web site, marked for identification.)

21 Q I'm going to put before you a document, Exhibit 9, and

22 ask you to take a look at it. This is a printout of

23 the TPL Web site. It was printed out on 3-23, 2005.

24 I'm going to ask you to look at the second page under

- 75 -

1 Buying Time, which is about two-thirds of the way

2 down. It says: Timing is critical in today's real

3 estate markets, but public agencies may not have the

4 capacity or budget to move quickly to acquire land

5 when it becomes unavailable. Using our private

6 capital, TPL can bridge the gap to secure and hold

7 vital lands under the public acquisition process until

8 the public acquisition can gear up. Now, have I read

9 that correctly?

10 A The word available, I think you said unavailable, but

11 otherwise --

12 Q I'm sorry, becomes available. I apologize. But other

13 than that, have I read it correctly?

14 A I believe so.

15 Q Now, in your last answer, you talked about the fact

16 that you could not bridge the gap in the Kunelius

17 property, and my question is, for you: what are you

18 referring to when you say our private capital?

19 MR. CONROY: Objection.

20 Q Using our private capital, TPL can bridge the gap.

21 What is the private capital?

22 MS. FETOUH: Objection.

23 A Well, it's not what I mean, because it's really not my

24 creation.

- 76 -

1 Q I understand.

2 A So, you're asking me what I believe TPL means?

3 Q Yes.

4 A Private capital is a generic term to describe lines of

5 credit and borrowed funds. Really, it's borrowed

6 funds to bridge gaps in conservation projects where

7 timing is a problem.

8 Q And so the term private capital from your point of

9 view is money that is borrowed by TPL?

10 A Yes.

11 Q That's private capital?

12 A Yes.

13 Q Is that definition of private capital your definition,

14 or do you think it has some greater understanding in

15 the public, that the term private capital means

16 borrowed funds?

17 MS. FETOUH: Objection.

18 MR. CONROY: Objection.

19 A I can only say what I believe it means here.

20 Q Do you know Rob Glassman?

21 A No.

22 Q You've heard of Rob Glassman?

23 A I may have, but I don't recall.

24 Q Robert Glassman?

- 77 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 A I don't believe I know Robert Glassman.  
 2 Q What was the point where TPL determined that it could  
 3 not bridge the gap?  
 4 A It wasn't so much a point in time if you're using the  
 5 phrase bridge the gap to mean is it possible to do the  
 6 deal, or are you using it to mean borrow money? I'm  
 7 not quite sure.  
 8 Q I'm using it however you meant to use it when you said  
 9 the answer to one of the questions was that TPL made a  
 10 determination. These are not the exact terms, but you  
 11 said made a determination that they could not bridge  
 12 the gap to acquire the property, something to that  
 13 effect. So, using it however you meant to use it, my  
 14 question is: at what point did you determine that you  
 15 could not bridge the gap?  
 16 A Well, what I can tell you is that there was a gradual  
 17 dawning that this project had lots of problems  
 18 associated with it. So, there was no exact point in  
 19 time when we can say that's when we knew. It was a  
 20 very gradual awareness that dawned on TPL that this  
 21 project was troubled.  
 22 Q Now, in considering the term bridging the gap, if we  
 23 consider the gap on one side is the purchase price and  
 24 on the other side is the buyer, and if TPL is the

- 78 -

1 Q And as you sit here today, you cannot say with any  
 2 certainty that any of those monies that were -- you  
 3 used the word deposited. I used the word earnest  
 4 money. You cannot say with any certainty that any of  
 5 those dollars were TPL dollars. Isn't that fair to  
 6 say?  
 7 A I do not know where they came from.  
 8 Q Now, if we look at the document --  
 9 A Well, let me -- I'd like to clarify that. That's all  
 10 right. I'll leave it at that.  
 11 Q Let's look at Exhibit 10, which is before you, and  
 12 this is also from the Town of Stow. It's Finance  
 13 Committee meeting minutes, January 7, 2003, town  
 14 building draft. It appears to be: Fincom joins the  
 15 Board of Selectmen in a joint meeting at 7:15. It  
 16 begins -- I'm going to read just a couple of  
 17 sentences.  
 18 Craig MacDonnell from TPL and David Cobb  
 19 from the Friends of Red Acre are present. The  
 20 Trust for Public Land is a national non-profit  
 21 organization that helps communities achieve  
 22 effective use in conservation land planning.  
 23 TPL, responding to the Stow Conservation Trust  
 24 and Friends of Red Acre, proposes that Stow

- 81 -

1 buyer, can you identify for me specific TPL funds, not  
 2 borrowed funds, not state funds, not town funds, but  
 3 TPL funds, which were identified and earmarked for the  
 4 purchase of the Kunelius property?  
 5 A Can I identify those funds?  
 6 Q Yes.  
 7 A No.  
 8 Q Were there any TPL funds ever specifically earmarked  
 9 for the purchase of the property?  
 10 A I don't believe so.  
 11 (WHEREUPON, Exhibit No. 10, Stow  
 12 Finance Committee minutes, January 7, 2003,  
 13 marked for identification.)  
 14 Q So, from your point of view, TPL itself never had one  
 15 dollar of the purchase price at risk with regard to  
 16 this project. Is that correct?  
 17 MS. FETOUH: Objection.  
 18 MR. CONROY: Objection.  
 19 A I don't think that's my testimony. No, I wouldn't say  
 20 that.  
 21 Q What were the funds that TPL, of the purchase price,  
 22 now, what funds which were to make up the purchase  
 23 price were actually TPL's own monies?  
 24 MR. CONROY: Objection.

- 79 -

1 exercise the right of first refusal at the  
 2 Kunelius land. TPL would like to bear 50 percent  
 3 of the 1.2 million dollar cost of the land. Do  
 4 you see that?  
 5 A I do.  
 6 Q Now, were you present at that meeting?  
 7 A As with respect to the other minutes --  
 8 Q Well, this is a joint meeting, so it's Fincom and the  
 9 Board of Selectmen. And so the question --  
 10 A My name is listed as being there. I have to say to  
 11 you, just in being honest, I don't, as I sit here this  
 12 morning, have an independent recollection of being at  
 13 this meeting.  
 14 Q Do you recall telling them that TPL would bear 50  
 15 percent of the cost of 1.2 million dollars?  
 16 A No.  
 17 Q Do you have any reason to believe that these minutes  
 18 are inaccurate with regard to that statement?  
 19 MR. CONROY: Objection.  
 20 MS. FETOUH: Objection.  
 21 A Yes, I do.  
 22 Q And in what regard are they inaccurate?  
 23 A I would not have said, I do not believe, that we would  
 24 bear 50 percent of the cost. That was not the project

- 82 -

1 A There were deposits made against the contract, the  
 2 amount of which I'm not quite certain of, but those  
 3 were TPL dollars.  
 4 Q Well, in fact, weren't those dollars that were donated  
 5 to TPL from the Friends of Red Acre?  
 6 A Some of them, I believe, were.  
 7 Q Weren't all of them, sir?  
 8 A I don't recall.  
 9 Q Is it likely that they were? Do you have any  
 10 recollection?  
 11 MR. CONROY: Objection.  
 12 MS. FETOUH: Objection.  
 13 A My recollection is that we did ask for a donation from  
 14 the Friends of Red Acre for some money up front. What  
 15 I can't remember is how much.  
 16 Q So, you don't remember how much of the earnest money  
 17 that was paid to Mrs. Kunelius was actually TPL funds  
 18 and how much had been raised by TPL through the  
 19 Friends of Red Acre. That's your testimony, correct?  
 20 MS. FETOUH: Objection.  
 21 A What I don't remember is how much, how many of the  
 22 dollars that were deposited with Mrs. Kunelius were  
 23 TPL dollars and how many were Friends of Red Acre  
 24 dollars.

- 80 -

1 structure that we were considering. So, I have to  
 2 assume that these minutes are inaccurate and just  
 3 not -- it doesn't jive with what was going on.  
 4 Q And that's because you never told anyone you'd pay 50  
 5 percent of the costs for the acquisition. Is that  
 6 fair to say?  
 7 A It is fair to say.  
 8 Q So, going further down, there is a sentence about one-  
 9 third down that says: TPL would buy the property and  
 10 would actually own it. And on the left-hand side,  
 11 there's a word, household, would be in the amount of  
 12 17.50 for ten years, and it picks up right there, just  
 13 about halfway down. TPL would buy the land and  
 14 actually own it.  
 15 A I see that.  
 16 Q So, what was TPL intending to use as a source of  
 17 income based on -- well, strike that.  
 18 Do you have reason to believe that this  
 19 statement is inaccurate as well, that is, TPL  
 20 would buy the property and actually own it?  
 21 A It would be consistent with the project design for TPL  
 22 to buy the property in September, I think it was, of  
 23 that year, subdivide it and then convey out the  
 24 pieces.

- 83 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 Q Now, at the time, in January of 2003, you had not  
2 identified a specific amount of money necessary from  
3 the town in order to accept an assignment. Is that  
4 correct?  
5 A Well, I think there was a discussion about four  
6 hundred thousand.  
7 Q And that discussion, you expect, was prior to  
8 January 7, 2003?  
9 A I would say that it is, in part, having my  
10 recollection refreshed by the reference to four  
11 hundred thousand in this paragraph.  
12 Q The purchase was approximately 1.2. That's fair to  
13 say, right?  
14 A It was a little under that.  
15 Q A little under. Four hundred thousand dollars  
16 subtracted from the 1.2 would leave \$800,000,  
17 approximately, correct?  
18 A Approximately.  
19 Q And you expected to make some money from the sale of  
20 the two lots. Did you have any expectation of what  
21 that would be on or about January 7th of 2003?  
22 A Is your question how much TPL thought we would sell  
23 142 and 144 for?  
24 Q Yes.

- 84 -

1 A And if we knew that at this moment in time?  
2 Q Yes.  
3 A I have a recollection of what, ultimately, we expected  
4 to sell those for, but I can't say whether at this  
5 moment in time I knew or I had that number in my mind.  
6 Q What is your recollection of what it ultimately would  
7 sell for?  
8 A Well, there's two pieces. I think the hope was that  
9 142 would sell for between two and three hundred and  
10 that 144 would sell for more. How much, I can't  
11 remember right now.  
12 Q So, if we have 300,000 and 700,000, I'm sorry, 300,000  
13 and 400,000, meaning 300,000 from one sale, 400,000  
14 from the town, and another 300,000 from the second  
15 lot, approximately, how did you anticipate making up  
16 the difference at that point?  
17 MS. FETOUH: Objection.  
18 A Well, I think there were other project costs as well.  
19 I mean, some of these properties needed to have  
20 renovation before they could be sold. So, I don't  
21 know what sum we were trying to achieve, but there was  
22 an intention to raise money privately.  
23 Q Have you ever read the complaint?  
24 MS. FETOUH: Objection. In this

- 85 -

1 matter?  
2 MR. McLAUGHLIN: No, the complaint in  
3 the matter has nothing to do with this.  
4 MR. CONROY: That's not necessary.  
5 MR. McLAUGHLIN: All right. Well, I  
6 mean, neither is the question. If you are asking  
7 that question, Madam, tell me what other  
8 complaint you could possibly be considering.  
9 MR. CONROY: Let's move on.  
10 MS. FETOUH: My objection has been  
11 noted.  
12 Q All right. Have you ever read the complaint in this  
13 matter?  
14 A I have skimmed through it.  
15 Q And did you read your answer in this matter prior to  
16 it being filed with the court?  
17 A Yes.  
18 Q Did you check it to make sure it was truthful and  
19 accurate?  
20 A I believe I did.  
21 Q Do you recall having a telephone discussion with  
22 Marilyn Kunelius after TPL accepted the assignment?  
23 A I remember trying to reach Mrs. Kunelius, and I also  
24 remember trying to reach her attorney then, Peter

- 86 -

1 Kachajian. I remember having difficulty reaching both  
2 of them, but I believe I recall talking to one or both  
3 of them at some point during that time.  
4 Q Do you recall talking to Mrs. Kunelius before the  
5 assignment?  
6 A I don't remember when I first talked to Mrs. Kunelius.  
7 Q I'm going to just quickly read something from the  
8 complaint. This is Paragraph 20 of the complaint.  
9 Shortly after TPL notified Kunelius of the  
10 assumption of Stow's exercise of right of first  
11 refusal, Kunelius and her counsel met with  
12 MacDonnell. During that meeting, Kunelius  
13 informed MacDonnell that the property was the  
14 sole asset of Kunelius, that she was a single  
15 woman supporting herself and the sole care-giver  
16 to her 91-year-old mother -- should have been  
17 father -- and that the sale of the property under  
18 the terms of the P&S were critical to her  
19 financial well-being and financial stability.  
20 Kunelius informed MacDonnell that she was relying  
21 on his representations that TPL would acquire the  
22 property under the terms of the P&S. MacDonnell  
23 acknowledged to Kunelius and her attorney that  
24 the acquisition of the property by TPL was a

- 87 -

1 certainty.  
2 Do you recall that discussion with  
3 Mrs. Kunelius?  
4 MR. CONROY: Objection.  
5 A As I said a minute ago, I recall an early discussion,  
6 but as I sit here this morning, I can't remember all  
7 of the details of it.  
8 Q Your answer to this was: MacDonnell admits that he  
9 met with Kunelius and her attorney on several  
10 occasions and was informed that Kunelius was a single  
11 woman caring for her elderly father and that Kunelius  
12 wanted to sell the property. Except as expressly  
13 admitted, MacDonnell denies the allegations in  
14 Paragraph 20 of the complaint.  
15 As you sit here today, is it your testimony  
16 that you have no recollection of telling  
17 Mrs. Kunelius that the sale was a certainty?  
18 A That is my testimony.  
19 Q And is it your testimony you would never have told  
20 Mrs. Kunelius that the sale was a certainty?  
21 MR. CONROY: Objection.  
22 A No, my testimony is that I don't recall using that  
23 word.  
24 Q Are you testifying that you did not use the word or

- 88 -

1 that you do not recall using the word?  
2 A I have no recollection of that word being used in that  
3 conversation.  
4 Q So, is your testimony concerning the word certainty as  
5 opposed to the concept that the sale would most  
6 certainly occur?  
7 A It is both. I do not believe that I used the word  
8 certainty, as I sit here this morning, but I do not  
9 recall using it or not using it.  
10 Q So, as you sit here today, you cannot deny with any  
11 certainty at all that you had a discussion with her in  
12 which you told her that she did not have to worry  
13 about this sale because it would occur.  
14 MR. CONROY: Objection.  
15 MS. FETOUH: Objection.  
16 MS. ECKER: Objection.  
17 A I believed it would occur. Whenever TPL goes into  
18 these projects, it is our one hundred percent belief  
19 and we are very confident that the deals go through,  
20 and in every one of the other Chapter 61 cases that  
21 TPL has worked on, it has gone through. So, I would  
22 have had confidence that this one would go through.  
23 Q In fact, you told her that every other TPL sale went  
24 through. Do you recall telling her that?

- 89 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 MS. FETOUH: Objection.  
 2 A I do not recall telling Mrs. Kunelius that. I  
 3 remember saying that to others through the course of  
 4 this project.  
 5 Q Is it likely, therefore, that you may have also said  
 6 it to her?  
 7 MR. CONROY: Objection.  
 8 MS. FETOUH: Objection.  
 9 A I can't use the word likely because I don't --  
 10 Q Is it possible?  
 11 A It is possible because I believed it would occur.  
 12 Q Now, do you recall saying to Mrs. Kunelius during that  
 13 meeting that TPL already had all of the money  
 14 assembled necessary to make the purchase?  
 15 A No, I don't remember that.  
 16 Q Did TPL have the money already assembled to make the  
 17 purchase?  
 18 A We had identified the money from the town, what we  
 19 thought we would get from the sale of the two lots and  
 20 the hoped for fund-raising. So, those were funds we  
 21 expected to bring to the table.  
 22 Q Was it your intention to pay Mrs. Kunelius with the  
 23 funds from the sale of the two lots after you acquired  
 24 it, or were you going to pay her the full purchase  
 - 90 -

1 price when you acquired the property?  
 2 MR. CONROY: Objection.  
 3 A I don't believe that had been determined.  
 4 Q So, as you sit here today, you do not even know  
 5 whether TPL intended to provide Mrs. Kunelius with the  
 6 full purchase price on the date of the closing or  
 7 whether the full purchase price was dependent upon the  
 8 subsequent sale by TPL of the two lots. Is that fair  
 9 to say?  
 10 A No, that's not what I'm saying. I'm saying something  
 11 different. I can clarify it if you'd like.  
 12 Q I would.  
 13 A I believe the contract had a mortgage provision. So,  
 14 when you ask the question whether or not TPL was going  
 15 to deliver the full amount, I don't believe it had  
 16 been decided whether or not it was appropriate to  
 17 utilize the mortgage provision or not.  
 18 Q In other words, take back a mortgage from  
 19 Mrs. Kunelius.  
 20 A To do whatever the contract said with respect to that.  
 21 MR. McLAUGHLIN: Okay. It's now a  
 22 little after 12:30, so we'll stop and pick it up  
 23 in a half hour or so.  
 24 MR. CONROY: Okay.  
 - 91 -

1 (Luncheon recess, 12:34 P.M.)  
 2 (After recess, 1:16 P.M.)  
 3 (All parties present)  
 4 MR. McLAUGHLIN: Just as a housekeeping  
 5 matter, in the room is Peter Kachajian who has  
 6 been co-counsel with me on this matter and  
 7 Mrs. Kunelius' attorney for many years and also  
 8 David Norris who is Mrs. Kunelius' husband, and  
 9 so counsel for Mr. MacDonnell has requested that  
 10 since they are both likely to be witnesses, that  
 11 when there is any discussion in which there's  
 12 testimony relating to something that they are  
 13 also going to testify to, that they leave the  
 14 room, and so is that acceptable to everybody?  
 15 MS. ECKER: Yes.  
 16 MS. FETOUH: Yes.  
 17 MR. McLAUGHLIN: So, I think I know  
 18 where you're going to testify, but if you think  
 19 so, then just get up and leave. Otherwise, I'll  
 20 ask you to leave when I think it is -- but don't  
 21 let me mistake that it is.  
 22 MR. KACHAJIAN: So, if I storm out, no  
 23 one will take it personally.  
 24 MR. McLAUGHLIN: That's correct.  
 - 92 -

1 MR. CONROY: Unless you let us know  
 2 that we're supposed to take that personally.  
 3 MR. KACHAJIAN: Oh, you'd know.  
 4 MR. CONROY: Okay.  
 5 By MR. McLAUGHLIN:  
 6 Q Okay. Just going back to, I think, the last thing  
 7 that we were talking about, and you had mentioned,  
 8 sir, that there was the possibility of taking back a  
 9 mortgage, which was referred to in the purchase and  
 10 sale agreement. Do you remember that?  
 11 A I do.  
 12 Q So, as I understand it, that mortgage was  
 13 approximately \$400,000 that Mrs. Kunelius was willing  
 14 to grant to Mosaic Commons in their purchase and sale  
 15 agreement. Is that right?  
 16 A I don't remember the amount.  
 17 Q Do you remember approximately what it was?  
 18 A We could take a quick look at the contract. I don't  
 19 remember the amount.  
 20 Q I'm going to represent to you that it was \$400,000 or  
 21 thereabouts.  
 22 A Okay.  
 23 Q Assuming that to be a fact, and we will look at the  
 24 purchase and sale agreement shortly, that would mean  
 - 93 -

1 that out of the 1.116 million of the purchase price,  
 2 that approximately \$800,000 was accounted for by way  
 3 of the mortgage that she was willing to give back and  
 4 the \$400,000 that you were receiving from the Town of  
 5 Stow. Is that correct?  
 6 A I'm not sure I understand your question. You're  
 7 saying that if you add up those --  
 8 Q Yeah, at the time that you have to close under the  
 9 terms of the purchase and sale agreement, if you  
 10 assumed all of the obligations and rights of Mosaic  
 11 Commons, the purchase price would have been assembled  
 12 by way of \$400,000 from the town and taking back a  
 13 mortgage note of \$400,000 from Mrs. Kunelius, leaving  
 14 approximately \$400,000 of additional cash that had to  
 15 be put in at the time of the closing to effectuate the  
 16 sale. Is that fair to say?  
 17 A There's one wrinkle to that. There may be more than  
 18 one wrinkle. The town's vote was split in two parts,  
 19 a three hundred thousand dollar component for open  
 20 space and a one hundred thousand dollar component that  
 21 I believe was split into two fifty thousand dollar  
 22 pieces attached to the sales of the two structures as  
 23 affordability restrictions, and it was my memory that  
 24 the town was uninterested in contributing the one  
 - 94 -

1 hundred thousand affordability dollars until those  
 2 properties had been renovated and were sort of up to  
 3 snuff, if you will. So, that one hundred might come  
 4 in sometime later.  
 5 Q So, is it fair to say that between 700- and \$800,000,  
 6 perhaps 700,000 if your understanding is correct,  
 7 would have been funds already accounted for in order  
 8 to effectuate the purchase of the Kunelius property,  
 9 leaving either 4- or \$500,000, approximately, that  
 10 needed to be found in order to complete the purchase?  
 11 A So, you would start with the three hundred open space  
 12 money?  
 13 Q Yes.  
 14 A And to that, what would you add?  
 15 Q The four hundred thousand dollar mortgage that  
 16 Mrs. Kunelius agreed to give back to Mosaic  
 17 Commons, which you had said earlier you had  
 18 considered.  
 19 A Considered.  
 20 Q Yeah.  
 21 A We had considered.  
 22 Q Right.  
 23 A Right.  
 24 Q Okay. So, given that, that would be a total of  
 - 95 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 \$700,000 that would have been available at the time of  
2 the closing, given the fact that 400,000 was a note,  
3 and that TPL would have to come up with between 4- and  
4 \$500,000 of additional funds at the closing in order  
5 to effectuate the sale.  
6 A If there was a way to take advantage of the mortgage,  
7 but ultimately we concluded that there wasn't.  
8 Q And you concluded that there wasn't because, isn't it  
9 fair to say, that TPL voted not to borrow the money  
10 from Mrs. Kunelius?  
11 A The reason that the mortgage didn't seem to be helpful  
12 for TPL is that it would have required that the  
13 property be subject to a mortgage and that --  
14 Q Right. And -- go ahead.  
15 A I was going to say that it was the town's insistence  
16 that, if they're going to spend their money, they're  
17 going to get a property interest for it. The town  
18 would be uninterested in getting the property interest  
19 that they were teeing up, which is the 45 acres,  
20 subject to a mortgage.  
21 Q So, it's fair to say that there was an independent  
22 decision by TPL not to avail itself of the four  
23 hundred thousand dollar mortgage that was part of the  
24 purchase and sale agreement. Isn't that fair to say?

- 96 -

1 MS. FETOUH: Objection.  
2 A It didn't seem that it would work.  
3 Q So, you had testified earlier that, according to your  
4 understanding of Chapter 61, there were certain  
5 provisions that were applicable on an assignment under  
6 Chapter 61 and certain provisions that were not. My  
7 question now is relative to the purchase price itself,  
8 which includes components such as mortgage provisions.  
9 Is it your testimony today that, prior to  
10 accepting the assignment, you had concluded that  
11 you would not comply with the mortgage provision  
12 because TPL didn't like the effect of that  
13 mortgage provision?  
14 MS. FETOUH: Objection.  
15 A I can't recall when, in the sequence of this long  
16 project, the mortgage problem came up, so I just don't  
17 have that recollection, but somewhere along the way  
18 that issue was considered and it resulted in sort of  
19 an awareness. It's not so much a decision, an  
20 awareness that it just wasn't going to be helpful.  
21 Q But the term of the mortgage was clearly stated in the  
22 purchase and sale agreement that was provided to you  
23 and to the town at the time that the town considered  
24 the exercise of the right of first refusal or the

- 97 -

1 assignment thereof. Is that fair to say?  
2 A Was the mortgage provision in the contract?  
3 Q Yeah.  
4 A Yes.  
5 Q So, it didn't come as a surprise to you or to the town  
6 that, as a result of complying with the terms of the  
7 contract, there would be a mortgage on the property  
8 for some period of time until the final \$400,000 was  
9 paid off. Is that correct?  
10 MS. FETOUH: Objection.  
11 A Not necessarily. I mean, I think part of TPL's  
12 analysis was not so much to conclude ahead of time,  
13 early in the game, whether or not the mortgage was  
14 helpful or not helpful or something that we'd take  
15 advantage of or not. It was just there.  
16 Q So, from your point of view, that term, that mortgage,  
17 was an option available to you but not something that  
18 you were required to do. Is that fair to say?  
19 MS. FETOUH: Objection.  
20 A You know, I don't know whether using the term option  
21 is the right way to describe it. I remember reading  
22 the provision and sometime later figuring out that it  
23 was problematic to use it and that we needed to  
24 wrestle with that issue.

- 98 -

1 Q Do you recall being told by Mrs. Kunelius --  
2 MR. McLAUGHLIN: Could you step out?  
3 MR. KACHAJIAN: Yes.  
4 (Messrs. Kachajian and Norris exit the room.)  
5 Q Do you recall being told by Mrs. Kunelius or her  
6 counsel that the mortgage provision remained available  
7 to TPL after TPL accepted the assignment?  
8 A I don't remember that. I remember having a discussion  
9 with somebody within Mrs. Kunelius' team about the  
10 mortgage, but I don't recall exactly what we said.  
11 Q Do you recall, generally, that perhaps Mr. Kachajian  
12 had a discussion with you concerning the fact that  
13 Mrs. Kunelius remained open to the application of that  
14 provision of the contract to TPL?  
15 A As I think I said, I don't remember that.  
16 Q So, you don't even remember Mr. Kachajian saying that?  
17 A I don't remember anybody expressing the availability  
18 of a mortgage provision. I remember having a  
19 discussion about the mortgage provision.  
20 Q At some point, the issue came up concerning looking  
21 for additional funds from the state. Do you recall  
22 that?  
23 A Yes.  
24 Q What were the funds that were being sought from the

- 99 -

1 state and what were the purposes of those funds?  
2 A The funds sought were a grant from DHCD, which I  
3 believe stands for the Department of Housing and  
4 Community Development.  
5 Q And what were they for?  
6 A My memory is that they were a grant which would help  
7 facilitate the conversion of the units to affordable  
8 structures, affordable housing.  
9 Q Do you remember what the amount was that you sought  
10 from the Commonwealth?  
11 A I believe it's three hundred and fifty thousand.  
12 Q And do you recall that it was initially 125,000 and  
13 then it was increased to 350 or 325?  
14 A No.  
15 Q So, you don't recall any circumstances in which there  
16 was a need to increase the amount of the application.  
17 You don't recall anything related to that?  
18 A I don't.  
19 Q Going back to the conversation and/or meeting with  
20 Mrs. Kunelius and her attorney, I believe your answer  
21 indicated that you remembered that this was her  
22 retirement. I think that's what you said, that you  
23 realized it was her retirement, but I probably -- let  
24 me just read his answer to make sure I'm saying that

- 100 -

1 correctly.  
2 MR. CONROY: You mean the answer to the  
3 complaint?  
4 MR. McLAUGHLIN: Answer to the  
5 complaint.  
6 MR. CONROY: Are you going to put it in  
7 front of him?  
8 MR. McLAUGHLIN: Yeah.  
9 Q All right. So, here's what it says. If you can just  
10 read your response. It's 20. That's to the telephone  
11 conversation.  
12 A You want me to read this?  
13 Q Yes.  
14 A Number 20?  
15 Q Yes.  
16 A MacDonnell admits, or, quote: MacDonnell admits that  
17 he met with Kunelius and her attorney on several  
18 occasions and was informed that Kunelius was a single  
19 woman caring for her elderly father and that Kunelius  
20 wanted to sell her property. Except as expressly  
21 admitted, MacDonnell denies the allegations in  
22 Paragraph 20 of the complaint.  
23 Q Would it refresh your memory if I told you that,  
24 during that discussion, Mrs. Kunelius will testify

- 101 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 that you told her that you had several million dollars  
2 available for the purchase in-hand at the time that  
3 you had the telephone discussion, in-hand?  
4 A It would not.  
5 Q Do you recall telling anyone that TPL, and when I say  
6 you, I mean TPL under that circumstance, so if I  
7 replace the word you having the money with TPL, would  
8 your answer still be the same? I wasn't implying that  
9 you had the money but that TPL had the money.  
10 MR. CONROY: Will you state it again?  
11 A Could you just ask the question?  
12 Q Would it refresh your memory if you were to learn that  
13 Mrs. Kunelius would testify that you told her that you  
14 had several million dollars, that TPL had several  
15 million dollars of funds in-hand, available to it  
16 immediately, for the purchase of the property?  
17 A It would not.  
18 Q Are you testifying that you didn't say that or that  
19 you don't recall saying that?  
20 A I don't have a recollection of that conversation, so  
21 that's sort of the sum total of what I can say about  
22 it.  
23 Q So, you're not saying for certain that you didn't say  
24 it. You're only saying that you don't have a

- 102 -

1 recollection of saying it.  
2 A There is nothing in my memory that suggests to me that  
3 I said that.  
4 Q Is there anything in your memory that suggests that  
5 TPL, at that time, had several million dollars of  
6 funds available to it on a fairly immediate basis that  
7 would allow for the purchase of the property without  
8 any other source other than the TPL funds themselves?  
9 A I'm sorry to make you do this, but I think I need to  
10 have you say that again.  
11 Q Is there anything that you can recall that would  
12 suggest that TPL had several million dollars available  
13 to it to buy the property at the time that you had a  
14 discussion with Mrs. Kunelius, this discussion  
15 referred to in Paragraph 20?  
16 A No.  
17 Q Did you ever tell Mrs. Kunelius that you had the  
18 equivalent of a Plan A or Plan B and a Plan C,  
19 something like that, so that no matter what happened  
20 the sale would go forward?  
21 A I don't.  
22 Q You don't recall telling her that, correct?  
23 A Right.  
24 Q Did you have a Plan A or a Plan B or a Plan C to

- 103 -

1 ensure that the sale would go forward even if Plan A  
2 failed or Plan B failed?  
3 A Well, the way TPL crunches these projects, generally,  
4 is with a Plan A, the set of circumstances that we  
5 hope will work, and I'd say in, you know, nine out of  
6 ten projects, what feels like Plan A actually is  
7 utilized but that there are, in most projects, a  
8 number of variables that result in some things  
9 changing. So, at the beginning of a project, it's  
10 very common that Plan A becomes Plan B. I don't  
11 recall this discussion using those terms.  
12 Q Do you have specific expertise in your role as the  
13 state director, Massachusetts state director, in  
14 applying for loans from DH, whatever, Department of  
15 Housing and Community Development?  
16 A No.  
17 Q You are aware, are you not, that TPL made an  
18 application for funds to the Department of Housing and  
19 Community Development?  
20 A Yes.  
21 Q And you are aware that TPL itself filled out the  
22 application for those funds, which were the 325- or  
23 \$350,000 that you referred to earlier, correct?  
24 A We hired a consultant who knows more about this

- 104 -

1 process than we do to help us do that, but together  
2 with him, we prepared it.  
3 Q And do you know who prepared it from TPL?  
4 A Together with the consultant?  
5 Q Yes.  
6 A Yes, I do.  
7 Q Who is that?  
8 A Chris LaPointe.  
9 Q And what's Chris LaPointe's position?  
10 A Project manager.  
11 Q And does he report to you?  
12 A He does.  
13 Q And do you recall working with Ross Perry in reviewing  
14 the application to DHCD?  
15 A Yes.  
16 Q I'm going to put before you what is now going to be  
17 marked as 11.  
18 (WHEREUPON, Exhibit No. 11, DHCD grant  
19 application, marked for identification.)  
20 Q I'm putting before you Exhibit 11, and just for the  
21 record, this is a compilation of various documents  
22 received from the town, beginning with Bate stamp  
23 number KUN336 and continuing to 411, the first page of  
24 which is a document that appears to be sent by Ross

- 105 -

1 Perry, project management of BNC/LID/Interconnect, to  
2 someone by the name of Bill, and the first sentence  
3 says: I left at your door the DHCD grant application  
4 that TPL has filled out.  
5 Do you recall receiving a copy of this?  
6 A Of the cover memo?  
7 Q The whole thing.  
8 A I have a recollection of seeing the application before  
9 it was submitted, whether this is the application that  
10 you have in front of me or it has, you know, more  
11 things here, I just don't know.  
12 Q This appears to us, having gone through the documents  
13 received from the town, that this is the application  
14 minus the signature of TPL. The second page appears  
15 to be the signature of Ross Perry on 3-30-03. Do you  
16 see that?  
17 A 3-3 --  
18 Q 3-30-03, second page.  
19 A 337?  
20 Q No, down at the bottom, his signature.  
21 A Oh, I'm sorry. I was reading the Bate's number. Yes,  
22 I see that.  
23 Q I direct you to the first page again, which says: Let  
24 Craig MacDonnell and me know if there are any

- 106 -

1 questions.  
2 Do you know from looking at this who Bill  
3 is?  
4 A I would guess that it's Bill Wrigley.  
5 Q And Bill Wrigley is the town administrator?  
6 A Either administrator or manager. I can't remember his  
7 title.  
8 Q And at the bottom, it says: Craig can be reached at  
9 617-367-6200. Is that the TPL number?  
10 A Yes.  
11 Q Now, I have a couple of questions here which, I must  
12 admit, confuse me. So, if I can direct your attention  
13 to Page 342, under the Financing Mechanism, and it's a  
14 paragraph with a one, Financing Mechanism.  
15 A Uh-huh.  
16 Q And the second paragraph says: TPL is prepared to  
17 purchase the property. TPL has a primary plan and a  
18 fallback plan. The primary plan envisions a  
19 multilateral funding approach to this project. Some  
20 of the funding is contingent, as explained below, but  
21 all of it is subject to a fallback plan, fallback line  
22 of credit from Wainwright Bank. Do you see that?  
23 A I do.  
24 Q So, earlier I had asked you if you knew a man by the

- 107 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 name of Rob or Robert Glassman. Do you recall me  
2 asking you that?  
3 A I do.  
4 Q Do you know who Robert Glassman is now?  
5 A No.  
6 Q I will represent to you that he was on the board of  
7 your advisors at the time that this application was  
8 made, a Robert Glassman. Does that ring a bell?  
9 A No.  
10 Q If I told you he was the president and founder of  
11 Wainwright Bank, would that ring a bell to you?  
12 A No.  
13 Q Were you aware that there was a line of credit at  
14 Wainwright Bank that was available as a fallback to  
15 the financing of this purchase from Mrs. Kunelius?  
16 A I am familiar that TPL has a line of credit with  
17 Wainwright Bank.  
18 Q Are you familiar that it was described as a fallback  
19 for the funding, as a contingency for the funding, of  
20 the purchase of Mrs. Kunelius' property?  
21 A Well, I see it written here, and it does remind me  
22 that there was some discussion about using Wainwright.  
23 Q And did you participate in the application for a line  
24 of credit to Wainwright Bank?

- 108 -

1 A No.  
2 Q Who would have made application on behalf of TPL to  
3 Wainwright Bank?  
4 MR. CONROY: Objection.  
5 A It's a standing line of credit. There's no  
6 application involved.  
7 Q Does TPL have a standing line of credit right now with  
8 Wainwright Bank?  
9 A Yes.  
10 Q What is the amount of that line of credit?  
11 A I don't know.  
12 Q Let me turn you to the next page, and before I do,  
13 let's stay on the same page and look at TPL's primary  
14 plan to generate funds, and it has a chart, and then  
15 it says: A. Town funds. B. Red Acre. C. The DHCD  
16 funds -- which are the subject of this application --  
17 and D. Private financing. Do you see that?  
18 A I do.  
19 Q Right after that, it says, quote:  
20 MR. CONROY: Excuse me. Private fund-  
21 raising.  
22 MR. McLAUGHLIN: I'm sorry. Private  
23 fund-raising.  
24 Q After that, it says: As a fallback position, if any

- 109 -

1 or all of the above-referenced sources of funds are  
2 unavailable, TPL intends to utilize capital from the  
3 private market. In this regard, TPL has available for  
4 its use a line of credit from Wainwright Bank in the  
5 amount of \$6,000,000 -- and it's written as 6,000,000  
6 with a dollar sign -- as evidenced by the letter  
7 attached as Exhibit -- blank. The use of this capital  
8 is subject to TPL's internal approval process,  
9 including customary due diligence and approval of the  
10 Board of Directors.  
11 Now, at the time -- did I read that  
12 correctly? Let's make sure I read that  
13 correctly.  
14 A I didn't follow you close enough to do that.  
15 Q Okay. All right. Well, your counsel hasn't corrected  
16 me, so I probably did.  
17 MR. CONROY: Minor.  
18 MR. McLAUGHLIN: Okay.  
19 MR. CONROY: Minor failings but  
20 otherwise substantively accurate.  
21 MR. McLAUGHLIN: That's the best thing  
22 anybody's said to me in a long time.  
23 THE WITNESS: He's very kind.  
24 Q Is today the first time that you have become aware

- 110 -

1 that there was a six million dollar line of credit  
2 available to TPL for the purchase of the property if,  
3 quote, any or all of the above-referenced sources  
4 listed on Page 343 and 342 were unavailable?  
5 A I was familiar with the Wainwright line of credit  
6 before today.  
7 Q And so you were aware that, should the funds that you  
8 sought from the town fail, TPL intended to use the  
9 line of credit. Is that fair to say?  
10 MR. CONROY: Objection.  
11 MS. FETOUH: Objection.  
12 A No, it's fair to say that TPL could use that line of  
13 credit if necessary and subject to due diligence and  
14 approval.  
15 Q But it doesn't say that. It says: TPL intends to  
16 utilize the capital from the private market. In this  
17 regard, it has available for its use a line of credit.  
18 Do you see that?  
19 A I do.  
20 Q Doesn't say could, might. It says intends to. Is  
21 that correct?  
22 A Well, the word in the document is intends.  
23 MR. CONROY: I'll point out for the  
24 sake of completeness that there is other language

- 111 -

1 that follows on that same page, Counsel.  
2 MR. McLAUGHLIN: I'm going to get to  
3 that.  
4 MR. CONROY: Okay.  
5 Q You're aware, are you not, in this litigation that TPL  
6 has made representations to the federal court that TPL  
7 did not have the money to purchase the property? Are  
8 you aware of that?  
9 MR. CONROY: Objection.  
10 A As I sit here today?  
11 Q Yeah.  
12 A I am not sure I am aware of that.  
13 Q Did you review the documents filed on behalf of TPL in  
14 the current litigation?  
15 A On behalf of TPL or myself?  
16 Q Yes, on behalf of TPL.  
17 A I believe I saw them before they were filed, yes.  
18 Q And did you review the documents that were filed on  
19 your behalf?  
20 A I did.  
21 Q And do you recall seeing statements to the federal  
22 court indicating that TPL did not have the money to  
23 purchase the property and that that's the reason that  
24 the property purchase did not go forward?

- 112 -

1 A Well, in fact, TPL did not have the money.  
2 Q I thought you just said that TPL has a line of credit.  
3 A The line of credit is not our money. It's somebody  
4 else's money.  
5 Q Is it your testimony today that TPL did not intend to  
6 use the line of credit as a way of paying for the  
7 property if all other sources failed?  
8 A Our intention with respect to the use of any borrowed  
9 money has to be decided in the context of what's  
10 possible. So, here, utilizing the six million dollar  
11 line of credit, being subject as it is to due  
12 diligence and approval of the Board of Directors, TPL  
13 could only borrow that money if the project manager,  
14 in this case me, went to the Board of Directors and  
15 said, "Can I use this money?" And there's a process,  
16 an internal process, for getting that approval.  
17 Q I want to direct your attention to the Motion to  
18 Dismiss of the Defendants, Trust for Public Land and  
19 Craig A. MacDonnell and the Town of Stow, and in this  
20 motion, beginning on Page 1, is the following  
21 statement: However, after paying thousands of dollars  
22 in deposits required under the agreement, TPL found  
23 itself unable to raise the money necessary to fund the  
24 project and was unable to complete its purchase of the

- 113 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 property. Do you see that?  
 2 A Yes.  
 3 Q Now, you were not unable to raise the money because  
 4 you had a six million dollar line of credit, but you  
 5 just decided not to use it. Isn't that reasonable to  
 6 say?  
 7 MR. CONROY: Objection.  
 8 MS. FETOUH: Objection.  
 9 MS. ECKER: Objection.  
 10 A The decision was made not to use the line of credit.  
 11 Q But that's not what you told the judge. What you told  
 12 the judge was you were unable to raise it. Is there  
 13 some sort of stop-payment or stop-borrowing order on  
 14 your line of credit at Wainwright Bank? In other  
 15 words, can you go in there right now, TPL, and borrow  
 16 money on the line of credit, or is it in some way in  
 17 default?  
 18 A I don't know.  
 19 Q You don't know if your own line of credit is in  
 20 default, sir?  
 21 A Correct.  
 22 Q Do you have reason to believe that your line of credit  
 23 is in default?  
 24 A I have no reason to believe.

- 114 -

1 Q So, as the director of the State of Massachusetts TPL,  
 2 is it your testimony today under oath that you do not  
 3 know whether your line of credit is in default or not.  
 4 MR. CONROY: Objection.  
 5 MS. FETOUH: Objection.  
 6 A I think I answered that question.  
 7 Q And the answer is you do not know whether it's in  
 8 default or not.  
 9 A Correct.  
 10 Q Do you know if it's overdrawn or not?  
 11 A I don't.  
 12 Q Do you know if any money is withdrawn on that account?  
 13 A I don't.  
 14 Q Who would?  
 15 MR. CONROY: Objection.  
 16 A Our finance manager.  
 17 Q And is the line of credit that's in Wainwright Bank,  
 18 is that money that is earmarked for the Massachusetts  
 19 branch of TPL?  
 20 A I think it's available for the region.  
 21 Q And so the region would be the New England region?  
 22 A Right.  
 23 Q Do you know who applied for that six million dollar  
 24 line of credit?

- 115 -

1 A No.  
 2 Q How would Christopher LaPointe know of this line of  
 3 credit as a project manager?  
 4 MS. FETOUH: Objection.  
 5 MR. CONROY: Objection.  
 6 A He would ask our business manager, finance manager.  
 7 Q He would not ask you, sir?  
 8 MR. CONROY: Objection.  
 9 A I'm not sure what he did in this case. I don't know  
 10 what he would do. He could ask me. He could also ask  
 11 our finance manager.  
 12 Q Is it your testimony today that this is the first time  
 13 you are aware that TPL informed the Commonwealth of  
 14 Massachusetts, under oath, that it had a six million  
 15 dollar line of credit?  
 16 MR. CONROY: Wait a minute. I object.  
 17 MS. FETOUH: Objection.  
 18 Q Do you know of any laws that prohibit the filing of  
 19 inaccurate documents with the state, the Commonwealth  
 20 of Massachusetts, with regard to attempting to obtain  
 21 grants where the applications contain false  
 22 information?  
 23 A No.  
 24 Q Are you aware of whether the money that you sought to

- 116 -

1 obtain from the Commonwealth of Massachusetts came  
 2 entirely from the Commonwealth of Massachusetts or  
 3 from some federal agency?  
 4 A I don't know.  
 5 Q Are you familiar with making applications for funds  
 6 from federal agencies?  
 7 A Yes.  
 8 Q Are you familiar with any statutes providing for  
 9 criminal and civil penalties for the filing of  
 10 inaccurate or untrue statements where federal funds  
 11 are being requested?  
 12 A No.  
 13 Q Let's go forward on this paragraph, under two,  
 14 contingency plan for cost overruns. It says: As part  
 15 of the larger Kunelius project, the Trust for Public  
 16 Land has organized a significant private fund-raising  
 17 campaign. This campaign, in conjunction with the Stow  
 18 CPA funds, the sale of the unit and the HDSP funds,  
 19 has sufficient capacity to, if necessary, cover cost  
 20 overruns. Do you see that?  
 21 A I do.  
 22 Q So, at the time of the application, you were not  
 23 relying on multiple sale of units. You were relying  
 24 on one sale. Isn't that correct?

- 117 -

1 A We made reference to just 144. Now, whether in fact,  
 2 by that reference, we intended to capture a sale of  
 3 just 140 -- at that time, it had not been subdivided.  
 4 Whether we were referring to just the single lot or  
 5 the hoped for double lot, I don't know.  
 6 Q Going on, it says: In addition, the Trust for Public  
 7 Land has received confirmation that its six million  
 8 dollar line of credit has been renewed by Wainwright  
 9 Bank and that these funds would be available to cover  
 10 cost overruns subject to TPL's normal due diligence  
 11 and internal review. Do you see that?  
 12 A I do.  
 13 Q Is this the first time you knew that the money could  
 14 be also used, the line of credit could also be used,  
 15 for cost overruns?  
 16 A No, I was aware of the line of credit.  
 17 Q But you were not aware of a fallback position that  
 18 involved the use of borrowing under the line of  
 19 credit?  
 20 A What I remember is that the line of credit was out  
 21 there and that, if the circumstances were right, it  
 22 might make sense to use it.  
 23 Q So, at the time that you told the federal court that  
 24 you could not raise the funds sufficient to purchase

- 118 -

1 the property -- I'm going to withdraw that question.  
 2 I'm going to read from a document that was filed on  
 3 your behalf called, "Memorandum of Law in Support of  
 4 the Motion to Dismiss of the Defendants, the Trust for  
 5 Public Land, Craig A. MacDonnell and the Town of Stow."  
 6 Down at the bottom of the first page on the  
 7 right-hand side, three lines up, it says: When  
 8 TPL accepted that assignment and exercised the  
 9 right of first refusal, TPL stepped into the  
 10 place of the buyer in that agreement and became  
 11 subject to its terms and conditions. When TPL  
 12 ultimately was unable to raise the money to fund  
 13 the purchase, it was unable to acquire the  
 14 property and forfeited thousands of dollars to  
 15 Kunelius pursuant to the liquidated damage  
 16 clause. Do you see that?  
 17 A I do.  
 18 Q Now, did you read this before it was submitted to the  
 19 court on your behalf?  
 20 A I believe I did.  
 21 Q And you've already testified that you were aware that  
 22 there was a line of credit. Am I correct there?  
 23 A Yes.  
 24 Q But you weren't aware of how much money was in the

- 119 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 line of credit. Am I correct as well?  
 2 A Correct.  
 3 Q And you weren't aware of whether the line of credit  
 4 was in default, is that correct?  
 5 A I don't have a recollection of the status of the line,  
 6 as I sit here today, regarding my awareness then.  
 7 Q Are you aware of TPL being in default on lines of  
 8 credit or other banking obligations?  
 9 A I am not.  
 10 Q In your tenure as director of the Massachusetts state  
 11 office of TPL, are you aware of any circumstance in  
 12 which TPL was in default on a line of credit or any  
 13 other financial obligation to a bank?  
 14 A I am not.  
 15 Q You are aware, are you not, that the president of  
 16 Wainwright Bank was a Board of Advisor member to TPL?  
 17 A I was not aware of that.  
 18 Q Are you aware of any banking obligations in which  
 19 insiders to bank operations have to disclose certain  
 20 applications for loans?  
 21 A Could you state that again?  
 22 Q Well, if you don't understand it, I'll withdraw the  
 23 question.  
 24 A I don't understand it.

- 120 -

1 Q I want to read from Page 6 of your Memorandum of Law  
 2 in Support of a Motion to Dismiss the Defendants, the  
 3 Trust for Public Land, Craig A. MacDonnell and the  
 4 Town of Stow. Page 6 says: Ultimately -- this is the  
 5 second paragraph, four lines down. Ultimately,  
 6 however, TPL was unable to raise the funds necessary  
 7 to purchase the property by the closing date of  
 8 September 26, 2003. Do you see that?  
 9 A Yes.  
 10 Q Now, I would like you to look back at Exhibit 11 and  
 11 tell me: what is the date of Exhibit 11 on the first  
 12 page?  
 13 A 3-30.  
 14 Q So, that would be March 30, 2003. So, we have April,  
 15 May, June, July, August, September. Six months later,  
 16 you certainly had the -- strike that.  
 17 Is it your testimony today that you elected  
 18 not to borrow the money for the purchase of the  
 19 property from Mrs. Kunelius?  
 20 MR. CONROY: Clarify when you say you.  
 21 MR. McLAUGHLIN: TPL.  
 22 A The decision of how to go forward on this project was  
 23 a function of a lot of different variables, including  
 24 whether or not it was likely that TPL could raise the

- 121 -

1 money privately via traditional fund-raising and the  
 2 sale of 142 and 144 and the town's contribution.  
 3 Q If that's the case, sir, why does TPL write: As a  
 4 fallback position, if any or all of the above-  
 5 referenced sources of funds are unavailable, TPL  
 6 intends to use capital from the private market?  
 7 The statement in the application to the  
 8 Commonwealth of Massachusetts seems to be  
 9 inconsistent with your last answer because this  
 10 statement says it doesn't matter whether you get  
 11 any of the funds; you're going to borrow in order  
 12 to meet the obligation. Did you read this  
 13 application before it was signed?  
 14 A Exhibit 11?  
 15 Q Yeah.  
 16 A I'm sure I did. Put it this way. I'd like to clarify  
 17 that. I don't have a recollection today of reading  
 18 it. I remember working on it.  
 19 Q I'm going to have you look at Page 351 of Exhibit 11.  
 20 A Yup.  
 21 Q Under Item 63, you're listed as the contact person for  
 22 TPL. Is that correct?  
 23 A Yes.  
 24 Q And also mortgagor. Do you see that?

- 122 -

1 A Sixty-four.  
 2 MS. FETOUH: Objection.  
 3 Q Sixty-four. And, I'm sorry, on Item 64, it refers to  
 4 owner-mortgagor. Do you see that?  
 5 A Yes.  
 6 Q What was TPL intending to borrow in order to be a  
 7 mortgagor based upon this application?  
 8 MS. FETOUH: Objection.  
 9 MR. CONROY: Objection.  
 10 A I have no memory of this, number 64, the significance  
 11 of it, today. TPL had the opportunity under the  
 12 contract to buy the land and become an owner of the  
 13 land.  
 14 Q But in order to get the money from the state, from the  
 15 Commonwealth, did TPL have to grant any mortgage? Did  
 16 it have to secure that money in any way?  
 17 A No. Unless TPL were to take advantage of  
 18 Mrs. Kunelius' mortgage.  
 19 Q I want you to look at the next page, Item 71, Denise  
 20 Pelletier. Who is she, if you know?  
 21 A She is an attorney who worked, at the time, for TPL.  
 22 Q Does she work for TPL anymore?  
 23 A No.  
 24 Q Was she an intern of Goodwin, Procter & Hoar?

- 123 -

1 A I don't know.  
 2 Q You're aware that there are virtually dozens of people  
 3 from Goodwin, Procter & Hoar that have worked as  
 4 interns at TPL, is that correct?  
 5 MS. FETOUH: Objection.  
 6 A There have been several. I wouldn't say dozens.  
 7 Q You wouldn't?  
 8 A No. No, I wouldn't.  
 9 (WHEREUPON, Exhibit No. 12, TPL Web  
 10 site excerpt, marked for identification.)  
 11 Q I'm going to put this -- Exhibit 12. Exhibit 12 is an  
 12 excerpt from your Web site. I think it refers to 40  
 13 associates, 17 partners, something like that. Do you  
 14 see that? And that they've done over 4,000 hours of  
 15 work for TPL since 2001. Do you see that?  
 16 A Yes.  
 17 Q So, there have been dozens of Goodwin, Procter & Hoar  
 18 partners and associates who have worked pro bono and  
 19 some as interns. Isn't that correct?  
 20 A That is correct. They were not all interns.  
 21 Q I understand.  
 22 A You asked me whether or not dozens had been interns  
 23 and so.  
 24 Q I want to point out with as much kindness as possible

- 124 -

1 that that Michael McLaughlin in that picture most  
 2 certainly is not me. Do you see that?  
 3 A Doesn't look like you.  
 4 MR. CONROY: Nor are you Mike  
 5 McLaughlin.  
 6 MR. McLAUGHLIN: Yes, I know.  
 7 Q So, can I have that back?  
 8 A Yeah.  
 9 Q On Paragraph 71, are you aware of whether Denise  
 10 Pelletier reviewed this document?  
 11 A I am not aware.  
 12 Q Looking at the next line, Dorothy Stuckey, Esquire,  
 13 we've already referenced Dorothy Stuckey. She is  
 14 counsel, correct, to TPL?  
 15 A Stuckey, yes.  
 16 Q Stuckey. Are you aware of whether she had reviewed  
 17 this document?  
 18 A I am not aware.  
 19 Q Would Dorothy Stuckey be aware of whether there was a  
 20 line of credit in the amount of \$6,000,000 that TPL  
 21 had?  
 22 MR. CONROY: Objection.  
 23 MS. FETOUH: Objection.  
 24 A I don't know.

- 125 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEF by Kenson

1 Q Is it likely that counsel would know that?  
 2 MR. CONROY: Objection.  
 3 MS. FETOUH: Objection.  
 4 A I don't know what she knows.  
 5 Q Are you aware of any circumstance in which the line of  
 6 credit was ever used?  
 7 A No, I am not aware of those circumstances.  
 8 Q Are you aware of any time which you were involved, and  
 9 I'm going to, with all due respect, remind you you're  
 10 under oath, that you were involved in the acquisition  
 11 of any property by TPL in which the line of credit was  
 12 used?  
 13 A I am not aware of utilizing the Wainwright line of  
 14 credit on one of my projects.  
 15 Q Are you aware of utilizing any line of credit on one  
 16 of your projects?  
 17 A It is hard to answer your question, because when  
 18 project managers seek approval to borrow money to do  
 19 projects, it's not always made clear to them which --  
 20 where the money comes from. In other words, the  
 21 finance office at TPL generally addresses accessing  
 22 those funds.  
 23 Q Is that finance office in Boston or in California?  
 24 A Here.

- 126 -

1 Q What other banks does TPL have lines of credit with?  
 2 MR. CONROY: Objection.  
 3 A I only know of one other, and I believe it's Sun  
 4 Trust.  
 5 Q As I understand it at the time you told the court, the  
 6 time the memorandums were filed on behalf of TPL and  
 7 yourself, that TPL was unable to borrow the money. As  
 8 it understand it, the amount of money that would have  
 9 had to have been borrowed -- strike that.  
 10 At the time that TPL filed its memorandum  
 11 with the court indicating that it was unable to  
 12 raise the money, it had available to it a four  
 13 hundred thousand dollar possibility with  
 14 Mrs. Kunelius and a six million dollar  
 15 possibility of borrowing with Wainwright Bank,  
 16 correct?  
 17 MS. FETOUH: Objection.  
 18 MR. CONROY: Objection.  
 19 A Well, as we've talked about with respect to the  
 20 Kunelius potential, that did not seem to be available.  
 21 Q Availing or available?  
 22 A As I think I mentioned earlier, my understanding of  
 23 the mortgage, the potential mortgage, was that were  
 24 TPL to close utilizing it, Mrs. --

- 127 -

1 Q I understand that. I understand that. What I'm  
 2 trying to say --  
 3 MR. McLAUGHLIN: I don't need an  
 4 explanation for why he didn't use it. My  
 5 question was: does he understand that that was  
 6 available and the six million dollar line of  
 7 credit was available for the possibility of  
 8 borrowing on? That's all I'm asking.  
 9 MR. CONROY: And I think he's entitled  
 10 to answer the question as he sees fit.  
 11 A I'm addressing the availability issue. If you'll let  
 12 me finish, I can complete the thought.  
 13 Q Well, before I do, before I do, the issue -- I don't  
 14 want to mince words. When I say available, I mean  
 15 that your organization had the ability, should it so  
 16 desire, to borrow that money. I am not talking -- I  
 17 don't want to mince words and have you say, well,  
 18 available to us means does it work. The question was:  
 19 did the contract, either the line of credit or the  
 20 purchase and sale agreement, allow you to borrow  
 21 money?  
 22 MR. CONROY: Objection.  
 23 MS. FETOUH: Objection.  
 24 Q That's the question.

- 128 -

1 MS. ECKER: Objection.  
 2 A The four hundred thousand dollar mortgage required an  
 3 actual mortgage to be imposed on the property which  
 4 would have prevented us from conveying it to the town.  
 5 Q Didn't that also require that of Mosaic Commons as  
 6 well?  
 7 A I don't know.  
 8 Q You don't know that?  
 9 A Well, what I'd like to do is finish my sentence.  
 10 MR. CONROY: Yeah, and I'm going to  
 11 insist that he finish uninterrupted.  
 12 MR. McLAUGHLIN: I thought he had  
 13 finished, but I'm sorry.  
 14 MR. CONROY: Go ahead, Craig.  
 15 A The Kunelius mortgage potential would have required an  
 16 actual mortgage to be imposed on the property itself.  
 17 The existence of that mortgage would have been  
 18 unacceptable to the Town of Stow because they wanted  
 19 to take their 45 acres free of any mortgage. If  
 20 they're going to invest, they don't want to burden the  
 21 property. That led us to conclude that, in your  
 22 words, that mortgage was unavailable.  
 23 (Messrs. Kachajian and Norris enter.)  
 24 Q You make the assumption in your answer, I believe,

- 129 -

1 that the mortgage was to be entirely on that portion  
 2 of the property that was going to the town. In fact,  
 3 TPL was to retain certain property after the purchase.  
 4 Isn't it in fact true that the mortgage that was to be  
 5 given to Mrs. Kunelius was to be on that portion of  
 6 the property not going to the town?  
 7 MR. CONROY: Objection.  
 8 A I don't know that.  
 9 Q But you have just testified that you did, because  
 10 you've said that the town objected concerning that  
 11 mortgage. I will represent to you that there is not  
 12 one document from the town indicating that objection,  
 13 unless I've missed it. So, if there is such an  
 14 objection, then I would request town counsel to  
 15 provide that to me, where the town says they will not  
 16 allow the deal to be done because of a mortgage on the  
 17 property to be given to the town. Having said that,  
 18 are you --  
 19 MS. ECKER: Can I object to that  
 20 request first?  
 21 MR. McLAUGHLIN: Yes.  
 22 MS. ECKER: I object to the request.  
 23 The town has turned over all documents pursuant  
 24 to the documents requested. Whether that

- 130 -

1 specific document exists, I am not sure.  
 2 MR. McLAUGHLIN: Okay.  
 3 MS. ECKER: But, in general, we've  
 4 turned over all documents to you, whether it's  
 5 contained in a conversation or otherwise. So, I  
 6 want --  
 7 MR. McLAUGHLIN: I'm not impugning you,  
 8 madam.  
 9 MS. ECKER: I understand, but, no, I'm  
 10 not going to go through the town documents at  
 11 this time and provide you any further documents.  
 12 MR. McLAUGHLIN: Well, at this point,  
 13 I'm going to ask the witness again if the witness  
 14 believes that the town objected to the borrowing  
 15 by the witness' organization because it resulted  
 16 in a mortgage on the portion of the land going to  
 17 the town. Then I will ask you again to see if  
 18 there is such a document, because nothing has  
 19 been produced. I'm just saying --  
 20 MS. ECKER: Well, let me just start  
 21 here. I don't know if nothing has been produced.  
 22 We produced hundreds of documents to you. It  
 23 might your interpretation of the document. I  
 24 have not had the opportunity, nor do I suggest

- 131 -

## DEPOSITION OF CRAIG MACDONNELL

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1 the witness had the opportunity, to review the  
2 hundreds of documents, including meeting minutes,  
3 that have been produced. So, I'm not going to  
4 agree to produce anything at this time.  
5 MR. McLAUGHLIN: Okay.  
6 MS. ECKER: Or agree that I haven't  
7 produced it.  
8 MR. McLAUGHLIN: Okay. Let the record  
9 reflect that counsel has spoken to the witness.  
10 Q I'm going to again ask you: are you certain that the  
11 town objected to TPL complying with the terms of the  
12 purchase and sale agreement and borrowing \$400,000  
13 from Mrs. Kunelius?  
14 MS. FETOUH: Objection.  
15 A I don't believe that was my testimony.  
16 Q What was your testimony, sir?  
17 A My testimony, I thought, and --  
18 MR. CONROY: With all due respect, the  
19 question is: what is his testimony? That's the  
20 right question.  
21 MR. McLAUGHLIN: What did I just say?  
22 MR. CONROY: What was your testimony?  
23 And the record will say what his testimony was.  
24 I'd suggest that he be asked a question now and  
- 132 -

1 he answer it.  
2 MR. McLAUGHLIN: No, that's not -- but  
3 I thank you for the instruction. What I am  
4 saying is I want to know what he said, not what  
5 he's saying now but what he said, and then I'll  
6 work from there.  
7 MR. CONROY: What he said back in time?  
8 MR. McLAUGHLIN: I want to know what,  
9 no, what he just said about the town objecting,  
10 because he's now saying that wasn't his  
11 testimony. I want to know what he thinks he just  
12 said about the town objecting.  
13 MR. CONROY: Well, I object.  
14 THE WITNESS: Well, I'm happy to  
15 clarify it.  
16 Q Okay. Go ahead.  
17 A Okay. The issue of the mortgage, requiring an actual  
18 mortgage to be placed on the property, led TPL to  
19 believe, correctly or incorrectly, that that would  
20 have been a problem for the town. It's not my  
21 testimony that I had a conversation with anyone from  
22 the town about that. It was my -- it is my  
23 recollection that that presented an obstacle to  
24 utilizing that portion of the financing.  
- 133 -

1 Q Why would the mortgage have been on the property that  
2 went to the town rather than the property that went to  
3 TPL?  
4 A I'm testifying to my recollection of that issue, and  
5 I've shared with you what my recollection is of that  
6 issue.  
7 Q But I believe you just said that TPL surmised that the  
8 town wouldn't want -- my question to you is: the land  
9 that was going to the town was a donation as part of  
10 the deal with Mosaic Commons. The mortgage with  
11 Mosaic Commons stayed on the remaining portion of the  
12 property that was to be owned by Mosaic Commons. What  
13 made TPL believe that it would not remain on the  
14 portion to be maintained by TPL and be somehow  
15 transferred to that land being given to the town?  
16 MR. CONROY: Objection. Among other  
17 things, this is not a 30(b)(6) deposition.  
18 MR. McLAUGHLIN: I understand. I'm  
19 going to do a 30(b)(6), and he may be the person  
20 to come back.  
21 MR. CONROY: I understand you are.  
22 MR. McLAUGHLIN: But if he can answer  
23 the question --  
24 A I think I've exhausted my ability to speak to that  
- 134 -

1 issue.  
2 Q So, if I can sum up, the town never told you they  
3 would not accept a mortgage on the property that was  
4 going back to the town, is that correct?  
5 MS. ECKER: Objection.  
6 A We never had a discussion about it.  
7 Q So, it was your, TPL's, assumption that they might  
8 object and, therefore, it would not work?  
9 A Correct.  
10 Q And that TPL never anticipated that the mortgage for  
11 the \$400,000 would be on the portion of the property  
12 that TPL was to acquire.  
13 MS. FETOUH: Objection.  
14 A That's where I don't have a recollection.  
15 Q But you realize, do you not, that TPL was the borrower  
16 and that the remaining portion of the land was going,  
17 as part of the sale, to the town? So, how is it  
18 possible that TPL could ever have anticipated that  
19 they acquire the money, they borrow the money -- they  
20 acquire the property, they borrow the money from  
21 Mrs. Kunelius, and somehow transfer the liability  
22 for that money to the town?  
23 MR. CONROY: Craig, don't answer.  
24 Q And somehow transfer the liability for that money to  
- 135 -

1 the town rather than TPL, because TPL's the borrower.  
2 MR. CONROY: Objection.  
3 MS. FETOUH: Objection.  
4 (Mr. Kachajian exits the room.)  
5 A With all due respect, I don't think I understand the  
6 question.  
7 Q Okay. Who was going to borrow the money, the  
8 \$400,000, under the purchase and sale agreement?  
9 A Do you mean under the Kunelius mortgage option?  
10 Q Yes, under the terms of the purchase and sale  
11 agreement, who was to borrow \$400,000 from  
12 Mrs. Kunelius?  
13 A The ultimate purchaser.  
14 Q Well, it says -- it doesn't say the ultimate  
15 purchaser, does it? It says Mosaic Commons. Isn't  
16 that what it says?  
17 MS. FETOUH: Objection.  
18 A Why don't we get out the contract.  
19 MR. CONROY: We have the document, so.  
20 THE WITNESS: I'm going to take a  
21 break.  
22 (Recess, 2:20 P.M.)  
23 (After recess, 2:31 P.M.)  
24 (Messrs. Kachajian and Norris not present)  
- 136 -

1 (WHEREUPON, Exhibit No. 13, MacDonnell  
2 letter to Kachajian, dated September 9, 2003,  
3 marked for identification.)  
4 By MR. McLAUGHLIN:  
5 Q Before you is Exhibit 13, which is a September 9,  
6 2003, letter from you to Peter Kachajian. Do you  
7 recognize this?  
8 A Yes.  
9 Q And that's your signature at the end?  
10 A Yes.  
11 Q Looking at the first page, there is a paragraph  
12 beginning with First, which reads: First, there is a  
13 significant fund-raising gap. What was the  
14 significant fund-raising gap that you were referring  
15 to?  
16 A The gap between the number of dollars that we believed  
17 was going to come in from the Town of Stow investment  
18 and the purchase price.  
19 Q And what investment are you talking about by the Town  
20 of Stow?  
21 A The three hundred thousand dollar open space  
22 investment and the one hundred thousand dollar  
23 affordable housing.  
24 Q And so did you become aware on or about September 9th  
- 137 -

## DEPOSITION OF CRAIG MACDONNELL

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1 of 2003 that the Town of Stow was not going to provide  
2 the three hundred thousand and the one hundred  
3 thousand?  
4 A No. No.  
5 Q So, the fund-raising gap that you're referring to does  
6 not include the Stow funds, correct?  
7 A Correct.  
8 Q And so what you were referring to -- well, let's go  
9 on. Not only has the economy been hostile to  
10 philanthropy, in general, we have experienced a  
11 catastrophic failure in the rejection of the 350,000  
12 Department of Housing and Community Development grant.  
13 Do you see that?  
14 A Yes.  
15 Q Now, why was that catastrophic?  
16 A Because we needed it.  
17 Q But if you look at Exhibit 11, Exhibit 11 says: As a  
18 fallback plan, if any or all of the above-referenced  
19 sources are unavailable, TPL intends to utilize  
20 capital from the private market.  
21 Now, Exhibit 11 suggests that nothing would  
22 be catastrophic because you had the fallback plan  
23 which involved a line of credit. What made the  
24 loss of the 350 catastrophic?

- 138 -

1 MR. CONROY: Objection.  
2 MS. FETOUH: Objection.  
3 A When TPL analyzes these projects, it identifies  
4 sources of takeout money, dollars that will be spent  
5 to acquire the property interests that are necessary  
6 to make the conservation project complete. Because  
7 TPL is not a landholding organization -- in other  
8 words, we don't buy land to hold for conservation. We  
9 occasionally will buy it and sell it, if necessary, to  
10 complete a conservation project -- we always look for  
11 the ultimate takeout, that is, the source of funds  
12 that will purchase the property interest that I just  
13 mentioned.  
14 So, in determining whether or not a project  
15 can be completed, TPL engages in an analysis of  
16 whether the ultimate takeout funds will be  
17 available. In this project, those funds appeared  
18 not to be available, ultimately. The fund-  
19 raising we had imagined did not materialize, the  
20 DHCD grant did not come through, and it did not  
21 seem as if it was possible to raise those dollars  
22 for the ultimate conclusion of the project, not  
23 that TPL could not borrow the money to make -- to  
24 replicate those dollars but that any borrowing

- 139 -

1 that TPL engages in is designed only as a  
2 stopgap, an interim stopgap, subject to our own  
3 due diligence that would satisfy us that  
4 ultimately that loan could be repaid from capital  
5 takeout.  
6 Q At the time that you accepted the assignment, I  
7 believe your testimony was that you had every  
8 expectation that everything would work out.  
9 A We did.  
10 Q Is it reasonable -- is it your position that  
11 Mrs. Kunelius, in signing the purchase and sale  
12 agreement with Mosaic Commons, should have  
13 anticipated, one, that TPL was coming onboard  
14 and, two, that eventually, notwithstanding their  
15 alleged best intentions, they would fail?  
16 MS. FETOUH: Objection.  
17 Q Is that something that you think Mrs. Kunelius should  
18 have anticipated?  
19 MR. CONROY: Objection.  
20 MS. FETOUH: Objection.  
21 A Well, I don't know if Mrs. Kunelius should have  
22 anticipated that, but an attorney reading the contract  
23 and knowing Chapter 61 would know that the assignee  
24 steps into the shoes of a contract negotiated by him

- 140 -

1 or her and that that contract imagined Mrs. Kunelius  
2 walking away with liquidated damages but not the  
3 purchase of her property.  
4 Q It's your testimony that you did not anticipate,  
5 ultimately, that this matter would fail, and, in fact,  
6 your testimony is that you had every expectation that  
7 it would go forward. Am I right on that?  
8 A As with every TPL project we work on. We don't get  
9 into these projects just for the heck of them. We do  
10 them to achieve conservation. So, absolutely, yes,  
11 completely our intention.  
12 Q And, therefore, you were not expecting that  
13 Mrs. Kunelius should have anticipated that TPL  
14 would not have been able to raise money for the  
15 purchase. Is that reasonable to say? I don't  
16 care about lawyers.  
17 A No.  
18 Q The question is: if you didn't anticipate it, is it  
19 reasonable for you to expect that Mrs. Kunelius should  
20 have anticipated that you would have failed?  
21 MR. CONROY: Objection.  
22 MS. FETOUH: Objection.  
23 MS. ECKER: Objection.  
24 Q TPL would have failed.

- 141 -

1 A I don't know what it is reasonable for Mrs. Kunelius  
2 to have expected on her own, but anyone reading the  
3 contract would know that there are two ways forward  
4 under that contract. One is with the purchase.  
5 Another is via an in-completed transaction.  
6 Q But you told the Commonwealth of Massachusetts there  
7 was a fallback plan. I still don't understand what  
8 was intended by TPL in telling the Commonwealth that,  
9 even if any or all of the other sources were  
10 unavailable, that TPL intends to utilize capital. If  
11 that's the fallback plan, what was the purpose of  
12 telling the Commonwealth that?  
13 MR. CONROY: Objection.  
14 MS. FETOUH: Objection.  
15 A What that means is that TPL could have borrowed to  
16 conclude this transaction if it made sense, otherwise,  
17 from a due diligence point of view. What I'm trying  
18 to tell you about is this due diligence piece that  
19 imagines in every TPL project that if borrowing is  
20 necessary, the borrowing is replaced by conservation  
21 takeout dollars that materialize somewhere. In the  
22 absence of dollars on the horizon, fund-raised, sale  
23 of 142 or 144, it would not be prudent for TPL to  
24 borrow the money to complete the transaction.

- 142 -

1 Q How much money you had to borrow?  
2 MS. FETOUH: Objection.  
3 A It depends how much money would have been on the table  
4 to begin with.  
5 Q Well, at the time, the application says none of the  
6 sources are critical because you can borrow. That's  
7 essentially what it says. My question is, at a  
8 minimum, one source was available. That's the four  
9 hundred thousand from the city, from the town, is that  
10 correct?  
11 MS. FETOUH: Objection.  
12 MR. CONROY: Objection.  
13 A Well, three hundred is available at the closing if the  
14 town gets their land. The one hundred wouldn't be  
15 available until the ultimate renovation and resale of  
16 the two units, of 142 and 144. It became apparent in  
17 the middle of this project that that subdivision  
18 process was fraught with problems, that we can talk  
19 about, but towards the end of the project, the ability  
20 of TPL to subdivide that property was highly  
21 problematic, and it did not appear as if that  
22 subdivision was possible.  
23 Q In fact, you were told prior to the time that you  
24 acquired the property that the subdivision was

- 143 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 unlikely. Isn't that true?  
 2 A No, in fact, we were told it was very likely.  
 3 Q Isn't it in fact true that, before you accepted the  
 4 assignment, you had already been told that a  
 5 subdivision was not likely at all?  
 6 A That's not my recollection at all.  
 7 Q My question remains: how much money did you think you  
 8 had to borrow at the time that you decided not to go  
 9 forward in making the purchase?  
 10 MR. CONROY: Objection.  
 11 A Well, as I testified earlier, there is no point in  
 12 time. It's a gradual awareness that this project is  
 13 getting highly complicated and highly problematic from  
 14 a whole lot of different perspectives.  
 15 Q Did the Mosaic Commons deal require a subdivision?  
 16 MS. FETOUH: Objection.  
 17 MR. McLAUGHLIN: I'll strike that.  
 18 Q Did the purchase and sale agreement with Mosaic  
 19 Commons include a subdivision?  
 20 MR. CONROY: Objection. It speaks for  
 21 itself.  
 22 A I don't remember.  
 23 Q Isn't it in fact true that the subdivision issue was  
 24 not part of the Mosaic Commons contract, but it was a

- 144 -

1 part of your requirement after you accepted the  
 2 assignment, that you wanted a subdivision of the  
 3 property in a particular way?  
 4 MR. CONROY: Objection.  
 5 A Well, I don't know what the Mosaic provision  
 6 contained. I just don't have that contract in front  
 7 of me, so I can't speak to it. My understanding is  
 8 that's it a 40B and that that short of greases the  
 9 skids.  
 10 Q Your counsel has the contract in front of him. Why  
 11 don't you take a look at it, and I'll look at the one  
 12 I have.  
 13 A I have it in front of me.  
 14 Q Okay. I'm going to move off that subject. I'm going  
 15 to ask you to look at Paragraph 30.  
 16 A Yes.  
 17 Q Second paragraph of Paragraph 30: Security for the  
 18 four hundred thousand promissory note afore-described  
 19 shall be in the form of a mortgage on the 8.57 acre  
 20 parcel. Do you see that?  
 21 A I do.  
 22 Q Is it fair to say that you were wrong in making the  
 23 assumption that the mortgage for the \$400,000 was  
 24 going to be on that portion of the property that was

- 145 -

1 being given to the town?  
 2 A What I don't know is whether the configuration of the  
 3 8.57 acre parcel is the same configuration that the  
 4 two, 142 and 144, parcels were located on.  
 5 Q Sir, did you just make up, today, the argument that  
 6 the Town of Stow would object to the inclusion of a  
 7 mortgage on the parcel of land that was to be donated  
 8 to the town?  
 9 MS. FETOUH: Objection.  
 10 MR. CONROY: Objection.  
 11 MS. ECKER: Objection.  
 12 Q Did you make that up today?  
 13 MS. FETOUH: Objection.  
 14 MS. ECKER: Objection.  
 15 MR. CONROY: Objection. And this is  
 16 inappropriate sort of questioning,  
 17 Mr. McLaughlin.  
 18 MR. McLAUGHLIN: I don't think so.  
 19 Your objection is noted.  
 20 Q Let me ask you again, sir.  
 21 A I will happily say I did not make that up today.  
 22 Q And can you tell me who raised that issue with you?  
 23 A What issue?  
 24 Q From TPL, as to whether or not the four hundred

- 146 -

1 thousand dollar mortgage was going to be put on the  
 2 land that was being given to the town?  
 3 MS. FETOUH: Objection.  
 4 A That was my own notion.  
 5 Q Now, you have, do you not, substantial tax expertise?  
 6 MS. FETOUH: Objection.  
 7 MR. CONROY: Objection.  
 8 A No.  
 9 Q Do you recall writing an extensive letter concerning  
 10 the tax benefits that Mrs. Kunelius would gain if she  
 11 accepted a four hundred thousand dollar reduction in  
 12 the purchase price?  
 13 A I can't remember whether the reduction was four  
 14 hundred, but I do remember writing a letter with  
 15 respect to the value of a bargain sale.  
 16 Q Do you recall that a significant component of your  
 17 letter dealt with the donation of land by  
 18 Mrs. Kunelius and the tax benefits to be derived  
 19 from that donation of land to the Town of Stow?  
 20 MS. FETOUH: Objection.  
 21 A I don't think it related to a donation. I think it  
 22 was with respect to a theoretical below-market sale.  
 23 Q Do you recall that a component of the sale involved a  
 24 donation of a substantial portion of the property to

- 147 -

1 the Town of Hull for a tax consideration on her part?  
 2 MR. CONROY: Objection.  
 3 MS. FETOUH: Objection.  
 4 MS. ECKER: Objection.  
 5 A That's not my recollection.  
 6 Q So, how was the remaining land going to be given to  
 7 the Town of Stow? The portion that was being donated  
 8 to the Town of Stow, how was that going to work under  
 9 the terms of the Mosaic Commons deal?  
 10 MS. FETOUH: Objection.  
 11 MR. CONROY: Objection.  
 12 A You're asking me to essentially read this contract and  
 13 tell you how the land pieces were to be -- I'm sorry.  
 14 Q Well, earlier you testified that you were familiar  
 15 under the provision of Chapter 61 with what provisions  
 16 of a purchase and sale agreement would be applicable  
 17 and what wouldn't. So, I have perhaps mistakenly  
 18 assumed -- I have assumed that you have read the  
 19 purchase and sale agreement, because you've drawn  
 20 conclusions as to what portions of the purchase and  
 21 sale agreement are applicable to TPL and which are  
 22 not.  
 23 So, let me start with a basic question.  
 24 Have you ever read in its entirety the purchase

- 148 -

1 and sale agreement?  
 2 MS. FETOUH: Objection.  
 3 A Yes.  
 4 Q Are you the person at TPL that came to the conclusion  
 5 that you could rely on the liquidated damage clause  
 6 provision?  
 7 MR. CONROY: Objection.  
 8 MS. FETOUH: Objection.  
 9 A There were a number of people at TPL who reached that  
 10 conclusion.  
 11 Q And who besides you reached that conclusion?  
 12 MR. CONROY: Before you answer the  
 13 question, I want to consider whether it calls for  
 14 an attorney-client privilege, raises an attorney-  
 15 client privilege issue.  
 16 Q Other than attorneys, was there anybody else?  
 17 MR. McLAUGHLIN: Does that do it for  
 18 you?  
 19 MR. CONROY: Well, why don't you  
 20 rephrase it, please.  
 21 Q Other than TPL's counsel, who reached the conclusion  
 22 that the liquidated damage clause would apply and that  
 23 should you not move forward in the purchase, Mrs.  
 24 Kunelius would be left with the earnest money?

- 149 -



## DEPOSITION OF CRAIG MACDONNELL

1 MR. CONROY: Objection.  
 2 MS. FETOUH: Objection.  
 3 A I can testify that I reached that conclusion, but I  
 4 can't say who else in their own minds reached that  
 5 conclusion.  
 6 Q Okay. Let's go back to Paragraph 30, and I want to,  
 7 again, ask you since I didn't understand your past  
 8 answer.  
 9 Look at Paragraph 30, the third paragraph of  
 10 Paragraph 30: Notwithstanding the foregoing,  
 11 buyer shall only encumber the 8.57 acre parcel  
 12 expected to be developed -- parentheses --  
 13 consisting of .93 acre parcel and 7.64 acre horse  
 14 farm parcel. Do you see that?  
 15 A Yes.  
 16 Q Again, I'm going to ask you what made you consider  
 17 that the security for the four hundred thousand dollar  
 18 loan from Mrs. Kunelius to TPL would be anything but  
 19 the parcel described for security in Paragraph 30?  
 20 A And as I sit here today, I don't know what caused me  
 21 to reach that conclusion.  
 22 Q In fact, isn't it fair to say that it's entirely  
 23 possible that your conclusion was wrong?  
 24 MS. FETOUH: Objection.

- 150 -

1 A I don't know if that is a fair thing to say. What I  
 2 started to talk about was the configuration of the  
 3 8.57 acre parcel. One of the things TPL was doing was  
 4 considering revising the boundary between the town  
 5 parcel and the developed parcels, and the reason that  
 6 we imagined doing that was to facilitate the  
 7 redevelopment, or the reconfiguration, of 142 and 144  
 8 so that they could be sold. There were a number of  
 9 provisions in the subdivision law that required us --  
 10 I think there were shape variances and various things  
 11 that required us to redraw the boundary of the line  
 12 between the town parcels and the developed parcels. I  
 13 don't know, as I sit here today, whether or not that  
 14 followed the same line.  
 15 Q But where in the purchase and sale agreement or in the  
 16 assignment does it allow TPL to alter such a basic  
 17 term of the purchase and sale agreement involving the  
 18 very essence of the amount that is to be paid and how  
 19 it's to be paid? In other words, does TPL, simply as  
 20 an assignee, have the right to say, "I don't like this  
 21 term as defined in Paragraph 30, and, therefore, we're  
 22 going to do something else"? Is that what TPL  
 23 believes is their right under the assignment?  
 24 MR. CONROY: Objection.

- 151 -

1 MS. FETOUH: Objection.  
 2 A I don't know what you're asking.  
 3 Q You do not know what I'm asking? Is it your testimony  
 4 that TPL could unilaterally change the terms and  
 5 provisions of Paragraph 30 and not have to comply with  
 6 Paragraph 30?  
 7 A That's not my testimony.  
 8 Q Is it your testimony that you agreed to comply with  
 9 Paragraph 30?  
 10 MS. FETOUH: Objection.  
 11 MR. CONROY: Objection.  
 12 A We stepped into the shoes of the contract.  
 13 Q But the contract does not say that there will be a  
 14 redefining of the 8.57 parcel. It doesn't say that  
 15 anywhere, does it?  
 16 A This discussion is in the context of trying to decide  
 17 whether or not the four hundred thousand dollar  
 18 mortgage was available or usable, correct?  
 19 Q Well, certainly, I think you're aware that it was  
 20 available. Mrs. Kunelius was willing to lend it. The  
 21 question becomes whether TPL believed it could  
 22 unilaterally say, "We're not going to do it unless we  
 23 get a subdivision in a manner that we deem  
 24 appropriate. Otherwise, there is no availability."

- 152 -

1 Essentially, that's what you're saying, and I'm  
 2 saying, where in the contract does that allow --  
 3 A I think you've misunderstood me.  
 4 MS. FETOUH: Objection.  
 5 MS. ECKER: Objection.  
 6 MR. CONROY: Objection.  
 7 A With respect to the subdivision, the subdivision issue  
 8 relates to the question of how TPL would create value  
 9 and bring dollars to the table. What became apparent  
 10 is that that subdivision wasn't possible.  
 11 Q But your argument, I think, sir, is that you stepped  
 12 into the shoes of the buyer. The shoes of the buyer  
 13 allowed for what was contained in Paragraph 30, but  
 14 you didn't like what was contained in Paragraph 30, so  
 15 TPL changed those terms by seeking to get variances,  
 16 did you not?  
 17 MS. FETOUH: Objection.  
 18 MR. CONROY: Objection.  
 19 MS. ECKER: Objection.  
 20 A With all due respect, it's a complete non sequitur.  
 21 What I'm talking about is how TPL brings money to the  
 22 table, not whether or not this contract imagines or  
 23 doesn't imagine us doing that.  
 24 Q Well, do you agree that you stepped into the shoes of

- 153 -

1 the buyer?  
 2 MS. FETOUH: Objection.  
 3 A Yes.  
 4 Q And do you agree that some terms do not apply to TPL?  
 5 A As a matter of Chapter 61 law, or lore, the assignee  
 6 is naturally required to comply with some but not all  
 7 terms.  
 8 Q Does the assignee have to comply with the purchase  
 9 price?  
 10 MR. CONROY: Objection.  
 11 MS. FETOUH: Objection.  
 12 A If the assignee goes forward and purchases the  
 13 property, I would say yes.  
 14 Q I'm going to put before you another document.  
 15 (WHEREUPON, Exhibit No. 14, Conditions  
 16 for right of first refusal, marked for  
 17 identification.)  
 18 Q The document that I am putting before you appears to  
 19 be an iteration of what you've already seen as  
 20 Exhibit 7. It was received from the Town of  
 21 Stow. It has DRAFT on the top. It discusses the  
 22 conditions for transfer of the town's right of  
 23 first refusal on the Kunelius property. The bold  
 24 language appears to be TPL's answers to

- 154 -

1 questions.  
 2 I had asked you earlier if you remembered  
 3 Exhibit 7, and you said you were not sure or, no,  
 4 you didn't. I'm asking you now. Do you remember  
 5 what is now Exhibit 14?  
 6 MR. CONROY: Objection.  
 7 A It looks somewhat familiar.  
 8 Q And isn't it in fact true that all of the TPL  
 9 responses are after each question raised by the town,  
 10 and those responses are in bold print?  
 11 A It appears that way.  
 12 Q And are you the author of the bold print responses?  
 13 A I believe so.  
 14 Q And you would agree with me that this correspondence,  
 15 or this document, had to be drafted prior to the  
 16 assignment?  
 17 A That would make sense.  
 18 Q So, let's look at Item No. 2, which is referring to  
 19 the town's request that the town be held harmless if  
 20 TPL backs out of the deal before closing, in other  
 21 words, and I'm quoting, in order words, that TPL will  
 22 defend the town against any suit resulting from the  
 23 failure of the property purchase to be completed.  
 24 Alternatively, TPL posts a bond that guarantees their

- 155 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 performance. Then there's a response.  
 2 TPL: The appropriate way for risks  
 3 presented by this project to be managed are for  
 4 the common law of contract to apply. This law  
 5 will require TPL, not the town, to be obligated  
 6 to perform if the right of first refusal is  
 7 assigned. The town's legal responsibility ends  
 8 with the assignment. If we are offered the  
 9 opportunity to accept the assignment and we  
 10 decide to go forward, the law will require us to  
 11 meet the essential requirements of the contract  
 12 or suffer the consequences of default.  
 13 Now, at this point, you were referring, were  
 14 you not, to the fact that if you defaulted, then  
 15 the only money that was at risk to you was the  
 16 20,000 or \$22,000 that had been paid as earnest  
 17 money to Mrs. Kunelius, is that correct?  
 18 MR. CONROY: Objection.  
 19 MS. FETOUH: Objection.  
 20 A We believed that the liquidated damages provision  
 21 would apply.  
 22 Q Now, I want you to go to the last page, Item No. 7.  
 23 The town raises the following issue: Because of the  
 24 difference in type of buyer, any parts of the P&S that

- 156 -

1 TPL believes don't apply should be addressed. A,  
 2 Paragraph 8, Time Performance, references a 12-month  
 3 extension if 40B approval process is proceeding  
 4 forward. B, Paragraph 30, Purchase Price Financing,  
 5 references a construction loan of 80 percent of the  
 6 construction costs. C, Paragraph 30, Purchase Price  
 7 Financing, references all purchase agreements of the  
 8 Co-housing project should be assigned to the seller as  
 9 further security. D, Paragraph 30, buyer shall only  
 10 encumber the 8.57 parcel. E, Paragraph 32, buyer and  
 11 seller agree to cooperate on a 40B submission. F,  
 12 Paragraph 35, upon receipt of all permits for the  
 13 development of the 8.57 acre parcel, seller will  
 14 transfer the right of the 42.1 acre parcel to the  
 15 town.

16 Now, those appear, is it fair to say that  
 17 those appear, to be the issues that the town was  
 18 identifying that needed to be considered in  
 19 reference to the difference in the buyer, in the  
 20 type of buyer? Is that how you understood that  
 21 question?  
 22 A I understood the question to be just a straight-up  
 23 question to TPL, whether or not A through F apply.  
 24 Q Look at your response. TPL: Because the decided

- 157 -

1 cases under Chapter 61 do not explicitly resolve all  
 2 of the potential issues that arise when a municipality  
 3 assigns its right of first refusal to a non-profit  
 4 conservation organization, including which of the  
 5 terms of the underlying contract should obligate the  
 6 assignee, it would be prudent for TPL and Marilyn  
 7 Kunelius' attorney to enter into good-faith dialogue  
 8 to determine which terms are relevant and which are  
 9 truly inapplicable. Do you see that?

10 A Yes.  
 11 Q So, you knew prior to accepting that that, in fact,  
 12 Chapter 61 did not identify with any certainty at all,  
 13 nor did the cases applying to Chapter 61 explicitly  
 14 resolve, what terms were applicable to whom.  
 15 MS. FETOUH: Objection.  
 16 MR. CONROY: Objection.  
 17 MS. ECKER: Objection.  
 18 A That's not true.  
 19 Q Well, I believe earlier you testified that -- I think  
 20 you said the cases -- I don't remember. You said that  
 21 you believed that, given the case law under Chapter  
 22 61, you could rely on the liquidated damage clause  
 23 provision. Yet, in this correspondence, you say,  
 24 because the decided cases under Chapter 61 do not

- 158 -

1 explicitly resolve all the potential issues that  
 2 arise, the parties essentially have to get together to  
 3 decide what truly does apply and what doesn't.

4 So, in your mind, is it fair to say that you  
 5 understood that the parties, i.e., yourself and  
 6 the town and Mrs. Kunelius, did not have an  
 7 understanding as to what terms specifically  
 8 applied and what did not and that's why you  
 9 suggested getting together with them?

10 MR. CONROY: Objection.

11 MS. FETOUH: Objection.

12 MS. ECKER: Objection.

13 A Okay. Well, there's a lot of pieces to that question.  
 14 I guess what I'd start by saying is that what TPL said  
 15 there was that the cases don't resolve all of the  
 16 issues but that, together with the advice of counsel,  
 17 it was clear to us that some provisions would apply.

18 Q What provisions? What provisions would apply?

19 MS. FETOUH: Objection.

20 Q The P&S, you have the P&S right in front of you.  
 21 Let's go through them and decide, have you tell me  
 22 right now, what provisions would apply and what  
 23 provisions would not.

24 MS. FETOUH: Objection. And I'll just

- 159 -

1 note the concern that this will infringe on  
 2 communications with counsel, as the witness has  
 3 identified, and just instruct the witness to  
 4 limit his answer to anything that does not  
 5 involve communications with counsel.  
 6 A Much of what I would say would refer to communications  
 7 with counsel.

8 MR. McLAUGHLIN: You want to go this

9 way?

10 MS. FETOUH: Well, I think I need some  
 11 time to talk to the witness about what those  
 12 communications are and the extent to which they  
 13 were shared with others.

14 MR. McLAUGHLIN: Okay. If you want to  
 15 go this way, we can go over to the court right  
 16 now. If your argument is, if I understand this,  
 17 that he's not going to testify as to what  
 18 provisions apply and don't apply because he only  
 19 heard it from his counsel, if that's what you're  
 20 actually saying, then I am prepared to go over to  
 21 see the judge right now if in fact that's what  
 22 you're saying. Maybe you're not.

23 MS. FETOUH: I think what I said is I

24 need to speak to the witness about this.

- 160 -

1 MR. McLAUGHLIN: Well, wait a minute.  
 2 The position taken by TPL, the position taken by  
 3 TPL is that some provisions apply and some do  
 4 not. It is a quintessential component of the  
 5 case as to what provisions do and do not apply.  
 6 This man is the director of Massachusetts and has  
 7 been the decision-maker with regard to a large  
 8 percentage of what's before the court right now.  
 9 I have every right for him -- since he has  
 10 testified he is aware that, under the provisions  
 11 of Chapter 61, certain provisions do and do not  
 12 apply, I certainly have the right to say, fine,  
 13 here's the P&S. Tell me what applies and what  
 14 doesn't. And if he says, no, I'm sorry, I  
 15 learned that from my counsel, I'm not asking what  
 16 counsel told him. I'm asking what is his  
 17 understanding. That's simple, what his  
 18 understanding is. I'm not asking what his  
 19 counsel told him.

20 MS. FETOUH: And it may be that he can  
 21 answer those questions, but I need an opportunity  
 22 to speak with my witness first. If I can have  
 23 that for a few minutes, we'll be right back.

24 MR. McLAUGHLIN: Okay.

- 161 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 MR. CONROY: And I would add to that,  
2 Mr. McLaughlin, that you do have a 30(b)(6)  
3 deposition coming, and this is not the  
4 appropriate role for this deposition. Let me  
5 finish, please. You're here, as I understand it,  
6 to question Craig MacDonnell about Craig  
7 MacDonnell's memories, things he saw, touched,  
8 smelled, heard, whatever. You'll have another  
9 opportunity to depose the Trust for Public Land  
10 as to what their position is.

11 MR. McLAUGHLIN: That is true.

12 MR. CONROY: And let me suggest that  
13 that be deferred to that deposition.

14 MR. McLAUGHLIN: I think I should have  
15 the right, since he's already testified what he  
16 knows under Chapter 61, to ask him the questions  
17 of which one applies. You can talk to him.  
18 You're talking to him in his role as an employee  
19 of TPL.

20 MS. FETOUH: That's correct.

21 MR. McLAUGHLIN: Okay. Just for the  
22 record, I want to note that the responses in this  
23 case have been indistinguishable as to who is  
24 saying what since they've been jointly filed.

- 162 -

1 So, each response is from Craig MacDonnell, and  
2 statements regarding these types of questions  
3 have also been defended by Craig MacDonnell.  
4 That's why we have a joint motion to dismiss  
5 statements by Craig MacDonnell that say there are  
6 certain provisions that apply and there are  
7 certain provisions that do. It's in your  
8 responses.

9 So, if it was only in TPL's, I would say  
10 maybe you're right. That's not what you guys  
11 elected to do, but if you want to talk to him,  
12 that's fine. We can take a break.

13 (Recess, 3:10 P.M.)

14 (After recess, 3:17 P.M.)

15 (All parties present)

16 MS. FETOUH: I've had an opportunity to  
17 speak with Mr. MacDonnell. We'll allow him to  
18 answer your question to the extent of his  
19 understanding of the answer to your questions in  
20 his individual capacity, not speaking for TPL as  
21 an institution.

22 MR. McLAUGHLIN: Okay. Thank you.

23 MR. KACHAJIAN: Is this regarding the  
24 purchase and sale?

- 163 -

1 MR. McLAUGHLIN: Yes. You probably  
2 ought to go.

3 (Mr. Kachajian exits the room.)

4 MR. CONROY: And let me make my little  
5 piece, too, if I may. I have objected  
6 previously, and now again, to the mixing of what  
7 I think is appropriate 30(b)(6) versus individual  
8 deposition and also to the notion of querying  
9 Mr. MacDonnell as a legal expert. With those  
10 objections stated and reserved, I have no grounds  
11 to instruct him not to answer, other than to be  
12 careful that he doesn't reveal any attorney-  
13 client confidences.

14 By MR. McLAUGHLIN:

15 Q Okay. Before we go into the purchase and sale  
16 agreement, I want to go back to some of your prior  
17 testimony. Do you remember we talked about the fact  
18 that you didn't know that variances were not going to  
19 be granted until well after the acquisition of the  
20 assignment?

21 A My memory was that I had reason to believe that the  
22 variance would be granted.

23 (WHEREUPON, Exhibit No. 15, Sommerlad  
24 email to Kennedy, marked for identification.)

- 164 -

1 Q I have put before you what has been marked as Exhibit  
2 15 and ask you if you recognize this document.

3 A I can describe it. I don't recall seeing it before.

4 Q Well, who is Ruth Kennedy, do you know?

5 A She's a Stow resident. I believe she's on the  
6 Planning Board.

7 Q Who is Karen Sommerlad?

8 A She lives on Red Acre Road.

9 Q And Exhibit 15 is a letter from Karen Sommerlad to R.  
10 Kennedy, Landvest. Subject, Planning Board. Question  
11 re Kunelius property. Importance, high. Ruth, I  
12 apologize for bothering you at work. I'm writing on  
13 behalf of Friends of Red Acre and Craig MacDonnell.

14 Was Karen Sommerlad writing on your behalf  
15 with regard to questions relating to variances  
16 and special permits and so forth?

17 A Well, I don't know. I remember having some  
18 conversations with a number of the Red Acre Road  
19 people about subdivision.

20 Q Does this remind you or refresh your memory concerning  
21 the fact that you were subsequently told that  
22 subdivision and special permits were not going to be  
23 granted in February of 2003?

24 MS. FETOUH: Objection.

- 165 -

1 A No.

2 Q Looking at the second paragraph, it reads: The  
3 question is, if we need a zoning variance for lot  
4 frontage and possibly other dimensional variances, can  
5 we submit an approval-not-required, ANR, for the  
6 submission and is the appropriate sequencing of events  
7 to get variances and then submit the ANR? Is it  
8 possible to submit an ANR and have it approved subject  
9 to receiving the variances? Is an ANR in this  
10 situation even possible?

11 Do you recall what the answer to those  
12 questions were?

13 A I remember having questions about how to go forward on  
14 the subdivision, and I believe we set up a meeting  
15 with a representative of the planning office to cut  
16 through the ambiguity in which we met with Karen  
17 Kelleher who is an employee of the town.

18 Q Let's go to this one.

19 (WHEREUPON, Exhibit No. 16, Jacobs  
20 email to Sommerlad and Kennedy, dated February 6,  
21 2003, marked for identification.)

22 Q Before you is what has been marked as Exhibit 16, and  
23 we're looking at the first page of that exhibit.

24 A Uh-huh.

- 166 -

1 Q This appears to be from Donna Jacobs to Karen  
2 Sommerlad and Ruth Kennedy, copied to you. Do you see  
3 that?

4 A Yes.

5 Q The second paragraph says: I do not clearly  
6 understand your objective. However, I can add some  
7 additional statements for your consideration. The  
8 caretaker's cottage is a pre-existing, non-conforming  
9 structure and use. As such, any extension, change in  
10 use or alteration addition is subject to a special  
11 permit from the ZBA. I am uncertain of the specifics  
12 of the Kunelius property as I do not have a map I can  
13 view at this time, but it is likely to be a pre-  
14 existing, non-conforming lot because almost 90 percent  
15 of the lots in Stow fall into that category. The  
16 Planning Board cannot endorse an ANR plan that will  
17 increase the degree of non-conformity of a pre-  
18 existing non-conforming lot. Because the purpose of  
19 the subdivision approval is to create lots with  
20 adequate accesses, frontage and lot area in compliance  
21 with the zoning bylaw, the board can't grant the  
22 waivers you are seeking.

23 Now, this is dated February 6, 2003, is that  
24 correct?

- 167 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 A The email from Jacobs to Sommerlad?  
 2 Q Yes.  
 3 A Yes.  
 4 Q So, you had reason to believe in early February, long  
 5 before the acceptance of the assignment, that there  
 6 were going to be problems with zoning for the two lots  
 7 in question, didn't you?  
 8 MR. CONROY: Objection.  
 9 A We knew it would be a challenging subdivision that  
 10 would require relief from the relevant boards.  
 11 Q But I thought you testified, sir, that you didn't have  
 12 any inkling that there was going to be a problem until  
 13 well after the acceptance of the assignment and it was  
 14 well into the process. In fact, you did have  
 15 knowledge very early on, even before you accepted the  
 16 assignment, that you weren't going to get approvals  
 17 from the Planning Board. Isn't that fair to say?  
 18 MS. ECKER: Objection.  
 19 MS. FETOUH: Objection.  
 20 MR. CONROY: Objection.  
 21 A I think you're confusing two issues.  
 22 Q What are the two issues I'm confusing?  
 23 A One is whether there was an analysis to be had on the  
 24 front end about which waivers, which variances, which

- 168 -

1 Q Do you realize that?  
 2 A Is that a question?  
 3 Q Yeah.  
 4 A I believe that the contract played out as it was  
 5 intended, to either enable Mosaic or the assignee to  
 6 go forward under the contract.  
 7 Q But, in fact, neither did. Isn't that correct?  
 8 A In fact, the contract imagined either a sale or a  
 9 default, and the default resulted in liquidated  
 10 damages. That was the end of the contract.  
 11 Q Is it your testimony that you believe Mrs. Kunelius  
 12 anticipated that TPL -- strike that.  
 13 Prior to TPL scoping out Mrs. Kunelius'  
 14 property, did you ever meet with her?  
 15 A Prior to scoping it out?  
 16 Q Yeah.  
 17 A No, I believe we spoke on the phone and met through  
 18 the course of the project.  
 19 Q But is it your testimony that you believe  
 20 Mrs. Kunelius anticipated that TPL would come in  
 21 and then default and that she would lose, as a  
 22 result of that default, the opportunity to sell  
 23 the property to Mosaic Commons?  
 24 MR. CONROY: Objection.

- 171 -

1 permits, were required and which path through that  
 2 process was appropriate. My recollection is that that  
 3 issue was wrestled with and that Karen Kelleher, in a  
 4 meeting with TPL, led us to believe that those issues  
 5 could be resolved. So, later on, however, in the  
 6 process, another more complicating factor emerged, so  
 7 that when I was referring to the problem earlier -- do  
 8 you follow me?  
 9 Q Yes.  
 10 A That I was referring to the problem that developed  
 11 later rather than the analysis, sort of the just  
 12 working through the kinks on the front end.  
 13 Q Let's go to the purchase and sale agreement, if you  
 14 would. Where in the purchase and sale agreement  
 15 between Mrs. Kunelius and Co-housing does it discuss  
 16 zoning changes, special permits or variances?  
 17 A I don't believe there's any reference to those issues  
 18 in the contract.  
 19 Q So, the insertion of a zoning variance, special  
 20 permit, subdivision issues, those three issues, was  
 21 made by TPL since it's not discussed in the purchase  
 22 and sale agreement itself.  
 23 A We're not inserting anything. I'm not suggesting that  
 24 the subdivision issue is a contract contingency. It's

- 169 -

1 MS. FETOUH: Objection.  
 2 MS. ECKER: Objection.  
 3 A I have no idea what Mrs. Kunelius --  
 4 Q Do you have an understanding that Mrs. Kunelius had  
 5 considered such an outcome when she was negotiating  
 6 her deal with Mosaic Commons?  
 7 MR. CONROY: Objection.  
 8 MS. FETOUH: Objection.  
 9 A Given that I wasn't in the room when she was talking  
 10 about this contract with her attorney, I have no idea  
 11 what she anticipated.  
 12 Q Looking at Paragraph 1, 2, 3, 4, of the purchase and  
 13 sale agreement, since I don't think anyone disagrees,  
 14 at least for the purposes of today, that those apply,  
 15 or perhaps they don't. Do you agree that all of those  
 16 provisions, 1, 2, 3 and 4, of the purchase and sale  
 17 agreement apply to TPL?  
 18 A Well, I'll go through them one by one. Should I do  
 19 that?  
 20 Q Sure.  
 21 A Paragraph 1 speaks in terms of the seller and the  
 22 buyer, and the buyer is listed as Co-housing  
 23 Resources, not TPL.  
 24 Q Right.

- 172 -

1 a fund-raising obstacle.  
 2 Q So, let me move back. This is the first time I've  
 3 heard that.  
 4 So, your refusal to move forward and  
 5 purchase the property did not result from the  
 6 failure to get a subdivision plan approved, or  
 7 any variances or permits that would be needed,  
 8 for the project that you envisioned to be built  
 9 on the site rather than what Mosaic Commons  
 10 envisioned. Is that correct?  
 11 MR. CONROY: Objection.  
 12 MS. FETOUH: Objection.  
 13 A What I'm saying is that the difficulty TPL encountered  
 14 in achieving the subdivision was not related to the  
 15 contract per se at all. It was a project issue that  
 16 prevented TPL from subdividing 142 and 144 and thus  
 17 realizing on the sale of the separate lots.  
 18 Q You realize, sir, that Mrs. Kunelius lost the  
 19 opportunity to sell the property to Mosaic Commons as  
 20 a result, direct result, of the actions of TPL in  
 21 accepting the assignment and then failing to go  
 22 forward in the purchase.  
 23 MS. FETOUH: Objection.  
 24 MR. CONROY: Objection.

- 170 -

1 A Of course, the operation of 61 would alter that.  
 2 Paragraph 2 talks about the property. Paragraph 3  
 3 talks about the buildings. Paragraph 4 talks about  
 4 title.  
 5 Q Well, let me stop at Paragraph 3 for a minute. It  
 6 says in as-is condition, does it not?  
 7 A Those are the last three words of Paragraph 3.  
 8 Q Do you have an understanding as to what as-is  
 9 condition means?  
 10 A I do.  
 11 Q And what is your understanding?  
 12 A That the property is sold as is.  
 13 Q Not with additional subdivisions, doesn't mention  
 14 that. Doesn't mention additional permits. It says as  
 15 is, isn't that correct?  
 16 MS. FETOUH: Objection.  
 17 MR. CONROY: Objection. It says what  
 18 it says.  
 19 Q Well, you don't see anything in there that talks about  
 20 additional provisions such as subdivisions or permits  
 21 or anything.  
 22 A As I mentioned a minute ago, the question of  
 23 subdivision is not a contract -- just allow me to  
 24 finish -- is not a contract issue that TPL is raising.

- 173 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 It's a fund-raising issue.  
 2 Q Have you ever made such a statement to the court, that  
 3 the subdivision issue was a function of the fund-  
 4 raising and that's why it didn't have the money?  
 5 MS. FETOUH: Objection.  
 6 MS. ECKER: Objection.  
 7 MR. CONROY: Objection. This  
 8 deposition is out of control. I will say that on  
 9 the record. And there comes a time when it gets  
 10 out of control.  
 11 MR. McLAUGHLIN: I have to say I am  
 12 just totally appalled, sir. I am appalled by  
 13 this --  
 14 MR. CONROY: Well, I'm sorry to hear  
 15 you're appalled. Now, why don't you ask a  
 16 factual question and go forward.  
 17 MR. McLAUGHLIN: I am just appalled at  
 18 the behavior of this man who is a member of the  
 19 bar. I am appalled.  
 20 MS. FETOUH: Objection.  
 21 MR. CONROY: I am going to walk out of  
 22 this room the next time that gets said or  
 23 anything of that sort gets said.  
 24 MR. McLAUGHLIN: You go ahead.

- 174 -

1 MR. CONROY: And you can talk to Judge  
 2 O'Toole and tell him, and I hope the stenographer  
 3 is getting this. You can tell him and defend to  
 4 him why you are abusing this witness. If you  
 5 want to ask a question, ask it, and he will  
 6 answer it.  
 7 MR. McLAUGHLIN: Do not, do not, point  
 8 your finger at me.  
 9 MR. CONROY: I'll point anything I want  
 10 at you. Go ahead and ask your question.  
 11 MR. McLAUGHLIN: If you'd like to walk  
 12 out of this, you do anything you want. The rules  
 13 are the rules. If you want to disregard the  
 14 rules, that's fine.  
 15 MR. CONROY: Yeah, the rules include,  
 16 the ethical rules include, not abusing a witness.  
 17 So, let's continue.  
 18 MR. McLAUGHLIN: I understand your  
 19 frustration based upon what's happened already in  
 20 this deposition, because -- I understand all of  
 21 your frustrations, because I can't believe that  
 22 there is a six million dollar line of credit and  
 23 all of you told the judge that there was no money  
 24 available.

- 175 -

1 MR. CONROY: Okay. Go ahead.  
 2 MR. McLAUGHLIN: Good luck. Not all  
 3 but maybe all.  
 4 Q All right. Let's look to number four. Did the title  
 5 provision apply to TPL?  
 6 A Based on sort of my own perception of this?  
 7 Q That's right. All of these are based upon your  
 8 perception as the director of the Massachusetts branch  
 9 of TPL.  
 10 A By your question, I assume you're asking whether or  
 11 not TPL, as the assignee, has the right to require  
 12 Mrs. Kunelius to provide good title.  
 13 Q I presume that that's what I mean.  
 14 A Well, if that's what you mean, I'll answer. I don't  
 15 want to guess about what you mean.  
 16 Q Does Paragraph 4, is that obligation applicable to  
 17 TPL?  
 18 A I believe it's applicable to Mrs. Kunelius. It  
 19 requires her to deliver good title.  
 20 Q Five, Paragraph 5?  
 21 A It requires Mrs. Kunelius to deliver the plan  
 22 referenced there.  
 23 Q Six?  
 24 A I would say that would require Mrs. Kunelius to comply

- 176 -

1 with the requirements related to registered land.  
 2 Q Paragraph 7, Purchase Price, I'm going to direct your  
 3 attention to the amount of the deposit listed under  
 4 Paragraph 7. How much of a deposit was made under  
 5 this provision?  
 6 A The first line says zero.  
 7 Q And noting the bottom of the compilation of numbers  
 8 there, four hundred thousand promissory note secured  
 9 by a mortgage, do you see that?  
 10 A Yes.  
 11 Q It has an asterisk that refers to Paragraph 30 for  
 12 further terms and provisions.  
 13 A Yes.  
 14 Q And turn to Paragraph 30. Now, this is the paragraph  
 15 that you had already looked at. My question to you  
 16 now is: does Paragraph 30, is this an obligation of  
 17 Mrs. Kunelius under the terms of the purchase and sale  
 18 agreement?  
 19 MS. FETOUH: Objection.  
 20 MR. CONROY: Objection.  
 21 A Based on my own perception of this contract, not from  
 22 TPL's perception, it would require Mrs. Kunelius to  
 23 make that mortgage a part of the assigned  
 24 relationship.

- 177 -

1 Q And you would agree that the mortgage is secured by  
 2 the 8.57 parcel as we've already discussed?  
 3 A We have already discussed that.  
 4 Q And looking at the time for performance, number eight,  
 5 is that time for performance applicable to TPL?  
 6 A I would say the first sentence is. The reference to  
 7 Chapter 40B would not apply.  
 8 Q So, the time for performance by TPL was September 26,  
 9 2003, correct?  
 10 A That's what the contract says.  
 11 Q Did you perform at that time?  
 12 A Did we bring the purchase price to the table on that  
 13 date?  
 14 Q Yes.  
 15 A No.  
 16 Q Now, is it your understanding that the bold language  
 17 of Paragraph 8 did not apply to TPL or was optional  
 18 for TPL?  
 19 A Well, based on my own understanding of the provision  
 20 and my own understanding of the law, the Chapter 40B  
 21 related extension would be inapposite to TPL.  
 22 Q And by inapposite, meaning that it just would be  
 23 inapplicable, it would be inappropriate based upon the  
 24 goals and directions of TPL as a conservation

- 178 -

1 foundation.  
 2 A No. No.  
 3 Q What do you mean by inapposite, then?  
 4 A It means, I mean, that TPL would not be in the  
 5 business of applying for a Chapter 40B approval.  
 6 Q But there was nothing that prevented TPL from moving  
 7 forward and obtaining a 40B approval, except that TPL  
 8 did not want to. Is that correct? Is there anything  
 9 in this contract, I'm taking about, that prevents TPL  
 10 from doing that?  
 11 A No.  
 12 Q In fact, this contract anticipates that the buyer  
 13 would do that. Isn't that fair to say?  
 14 A Anticipates that Mosaic Commons would.  
 15 Q And you testified before that TPL steps into the shoes  
 16 of Mosaic Commons, correct?  
 17 A I have.  
 18 Q And would it be your testimony that Mrs. Kunelius  
 19 should have understood that maybe TPL may also want to  
 20 do a 40B?  
 21 MS. FETOUH: Objection.  
 22 A I have no idea what she would have expected.  
 23 Q Number nine, does this apply to TPL?  
 24 A I believe it would require Mrs. Kunelius to comply

- 179 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 with that paragraph.  
 2 Q Number ten?  
 3 A I believe the printed paragraph before the asterisk  
 4 would enable Mrs. Kunelius to perfect title and go  
 5 forward.  
 6 Q Number eleven and twelve are related. So, I'm going  
 7 to ask you, at any time, did you determine that  
 8 Mrs. Kunelius had failed to provide the property  
 9 in accordance with what she was required to do by  
 10 way of title defect? Did you identify any title  
 11 defects?  
 12 A I don't recall any title defects.  
 13 Q So, twelve really doesn't apply because no defects  
 14 were identified. What about thirteen?  
 15 A I haven't read Paragraph 12 yet, but I'll move on to  
 16 thirteen. Or eleven. Okay. I believe Mrs. Kunelius  
 17 could, based on my own understanding, could ask that  
 18 TPL live by the terms of Paragraph 13.  
 19 Q Fourteen?  
 20 A That would enable Mrs. Kunelius to clear title with  
 21 purchase.  
 22 Q Fifteen?  
 23 A Fifteen, based on my own understanding, would require  
 24 Mrs. Kunelius to maintain insurance on the property.

- 180 -

1 Q Sixteen, seventeen, together, since they deal with  
 2 adjustments, would you agree that at the time of  
 3 closing, TPL would have the right to make adjustments  
 4 on fees paid for water, sewer and so forth, and  
 5 Mrs. Kunelius would have the right to recover on  
 6 amounts that had already been paid but not fully  
 7 accrued?  
 8 A I'm just going to read these quickly.  
 9 Q Okay.  
 10 A It appears as if 16 and 17 could be utilized by both  
 11 Mrs. Kunelius and the assignee.  
 12 Q Who was going to pay the brokerage fee under eighteen?  
 13 A The language of Paragraph 18 suggests that a brokerage  
 14 fee would be paid by the seller.  
 15 Q Nineteen is probably inapplicable to this situation.  
 16 The deposit described in 20, were deposits made?  
 17 A Yes.  
 18 Q Were these the earnest money deposits that are  
 19 described in Paragraph 31?  
 20 A I believe TPL made what are described in Paragraph 31,  
 21 or made deposits, however they're described, to  
 22 Mrs. Kunelius.  
 23 Q Do you differentiate between a deposit and earnest  
 24 money?

- 181 -

1 A It's been my understanding that a deposit is a deposit  
 2 is a deposit.  
 3 Q And is earnest money earnest money earnest money?  
 4 A My understanding all along is that whatever had been  
 5 paid ahead of time before the purchase price, before  
 6 the closing, excuse me, was a deposit.  
 7 Q And is that because of your understanding of normal  
 8 real estate procedure in which money was put down to  
 9 hold the property?  
 10 A It's my recollection of this transaction.  
 11 Q Did you have any understanding that the earnest monies  
 12 described in Paragraph 31 were to be used as living  
 13 expenses by Mrs. Kunelius during the pendency of the  
 14 40B approval process?  
 15 A No.  
 16 Q So, is it fair to say there's nothing in this contract  
 17 that says that, but did you have any separate  
 18 understanding that the money that was being given to  
 19 Mrs. Kunelius, that fifteen hundred dollars a month,  
 20 was because she didn't have any money to live on and,  
 21 therefore, Co-housing agreed that they would pay her  
 22 living expenses while they went forward?  
 23 A No.  
 24 Q Today is the first time you've heard that?

- 182 -

1 A Yes.  
 2 Q On Paragraph 21, that's the provision that you believe  
 3 applies, is that correct, on liquidated damages?  
 4 A I do believe, on my own personal understanding of the  
 5 contract, that Paragraph 21 applies.  
 6 Q Twenty-two, 23, 24, don't seem to apply. Twenty-five?  
 7 A Based on my own understanding of the contract, I  
 8 believe Paragraph 25 would apply.  
 9 Q So, representations made by you on behalf of TPL would  
 10 apply to this purchase. Is that fair to say? Is that  
 11 how you read that?  
 12 MS. FETOUH: Objection.  
 13 MS. ECKER: Objection.  
 14 MR. CONROY: Objection.  
 15 A The way I read that is as follows: the buyer  
 16 acknowledges that the buyer has not been influenced to  
 17 enter into this transaction nor has he -- I guess, in  
 18 this case, she -- relied upon any warranties or  
 19 representations not set forth or incorporated in this  
 20 agreement. And it goes on.  
 21 Q And TPL is the buyer?  
 22 A TPL is the assigned buyer.  
 23 Q Mortgage contingency clause refers to 80 percent of a  
 24 project construction price. Under your understanding

- 183 -

1 of this contract, could you have borrowed money, TPL  
 2 have borrowed money, construction loan, and have it  
 3 secured by the property?  
 4 MR. CONROY: Objection.  
 5 A Based on my own understanding of the contract, this is  
 6 exactly the kind of provision that would not apply to  
 7 TPL.  
 8 Q That's by election of TPL. In other words, if TPL  
 9 were to elect to have a project construction price, I  
 10 mean, a conventional financing, they could do that.  
 11 TPL could have availed themselves of this provision,  
 12 correct?  
 13 MS. FETOUH: Objection.  
 14 MS. ECKER: Objection.  
 15 MR. CONROY: Objection.  
 16 A Well, speaking on my own understanding of the  
 17 contract, it appears that Paragraph 26 was designed to  
 18 enable -- we've been saying Mosaic Commons, but it's  
 19 actually Co-housing Resources -- to borrow money to  
 20 build the project that they imagined, and since that  
 21 notion really is inapposite to what TPL was intending  
 22 to do, it seems to me that Paragraph 26 would not be  
 23 available for TPL to rely on.  
 24 Q That's because TPL wouldn't do the 40B. Is that

- 184 -

1 correct?  
 2 A It's because that provision imagines a large-scale  
 3 construction on the property.  
 4 Q So, it is important for you to consider what the  
 5 provision must have imagined at the time that it was  
 6 entered into in order for it to have some validity in  
 7 the contract. Is that your testimony?  
 8 MS. FETOUH: Objection.  
 9 A My testimony is, on my own personal understanding of  
 10 the law, is that a court would require some provisions  
 11 to apply and others not to apply and that there would  
 12 be an analysis conducted by a judge, if this were ever  
 13 put to a judge, that would figure out which provisions  
 14 are applicable to an assignee and the assignee's  
 15 purpose under the statute.  
 16 Q Where does it say that, under the statute? Have you  
 17 ever found any particular portion of the statute that  
 18 deals with what the intention of the assignee or his  
 19 purpose might be, his or its purpose?  
 20 A What I'm referring to is the lore and the common law  
 21 under Chapter 61A that's understood by Chapter 61A  
 22 practitioners.  
 23 Q So, you've had some experience identifying what  
 24 Chapter 61A practitioners do as a matter of course.

- 185 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 How did you establish what that was?  
 2 A It's through working with them.  
 3 Q Any other provision of the purchase and sale agreement  
 4 that you believe -- well, which one are we on here?  
 5 We're on the mortgage contingency, the construction of  
 6 the agreement, lead paint law, smoke detectors. The  
 7 purchase price financing, we have already discussed.  
 8 The earnest money, we have discussed. The 40B  
 9 application and transfer of the land, I think you've  
 10 discussed. Are there any other provisions? For  
 11 example, let's go to thirty-five.  
 12 A I don't think I have an opinion on that one.  
 13 Q Well, you would agree with me, wouldn't you, that the  
 14 seller was not going to convey the entire parcel to  
 15 Co-housing but, rather, was going to convey 8.57 acres  
 16 only, and that the purchase price was for the 8.57  
 17 acres only and that the remaining parcel would be  
 18 transferred as a charitable contribution to the town?  
 19 Isn't that correct?  
 20 A Paragraph 35 contemplates that.  
 21 Q But that's not what TPL contemplated, is it? In other  
 22 words, TPL did not contemplate spending 1.116 million  
 23 dollars for the 8.57 acres, did it?  
 24 MS. FETOUH: Objection.

- 186 -

1 A I think it imagines, speaking of my own understanding  
 2 of the contract, that it would have the ability to  
 3 control the whole parcel and achieve the conservation  
 4 project that we've talked about.  
 5 Q Your answer, therefore, is that TPL did not want to  
 6 comply with a strict reading of Paragraph 35 because  
 7 TPL wanted to control the whole parcel. Is that fair  
 8 to say?  
 9 MS. ECKER: Objection.  
 10 MS. FETOUH: Objection.  
 11 MR. CONROY: Objection.  
 12 A No, I'm saying that our intention was to have that  
 13 parcel, a conservation parcel that in our minds was  
 14 that parcel, go to the town and that there be a  
 15 development on a portion adjacent to Red Acre Road  
 16 that would bring enough dollars to be able to pay  
 17 Mrs. Kunelius.  
 18 Q Or pay back TPL had they borrowed on their line of  
 19 credit.  
 20 A Our intention was to pay Mrs. Kunelius.  
 21 Q But that money from the parcel development was  
 22 intended, at least initially, according to the  
 23 statements that you made to the Commonwealth of  
 24 Massachusetts, that that development would pay back

- 187 -

1 TPL for the money it borrowed under its line of credit  
 2 with Wainwright Bank.  
 3 MS. FETOUH: Objection.  
 4 A If TPL decided to borrow the money.  
 5 Q So, the crux of the issue, from your point of view, is  
 6 that it was simply an issue of whether TPL decided it  
 7 wanted to borrow or not. If it didn't, then it  
 8 wouldn't. If it did, Mrs. Kunelius would be paid. Is  
 9 that fair?  
 10 MS. FETOUH: Objection.  
 11 A No.  
 12 Q What's unfair about that?  
 13 A What I've tried to help you understand is that TPL's  
 14 mission was to complete this project. The way we  
 15 would go about that would be to raise money in these  
 16 various ways. If it appeared likely that either  
 17 private fund-raising or private sales were going to  
 18 come together successfully, then TPL would have  
 19 considered borrowing ahead of time, but where, in this  
 20 case, where it seemed so unlikely that those various  
 21 sources of money would come back to TPL, that it would  
 22 not have been prudent for TPL to borrow.  
 23 Q So, it was the fact that TPL faced a risk of loss that  
 24 was the reason that they didn't go forward. When you

- 188 -

1 were doing that analysis, is it fair to say that you  
 2 became aware that Mosaic Commons had been dissuaded  
 3 from re-applying to purchase the property and get a  
 4 40B because of the activities of TPL and the Town of  
 5 Stow?

MS. FETOUH: Objection.

MR. CONROY: Objection.

8 A No.  
 9 Q Did you ever have discussions with anyone from Mosaic  
 10 Commons or Co-housing?  
 11 A Yes.  
 12 Q Are you aware that Mosaic Commons believes that TPL  
 13 and the Town of Stow were intentionally trying to  
 14 dissuade it from coming back and purchasing the  
 15 property under the 40B requirement?  
 16 MR. CONROY: Objection.  
 17 A I am not aware of that.  
 18 Q Are you aware of any conversations between yourself  
 19 and anyone from the town dealing with the fact that  
 20 the town members were pleased with your efforts  
 21 because it resulted in the 40B being defeated, in  
 22 effect, because Mosaic Commons would not come back?  
 23 MS. ECKER: Objection.  
 24 MR. CONROY: Objection.

- 189 -

1 A No.  
 2 Q It is your testimony that no one ever said to you that  
 3 the outcome prevented low-income housing from being  
 4 adjacent to the properties and the Red Acre Road and  
 5 that that was a result that a lot of people hoped to  
 6 achieve?  
 7 A I don't recall anyone saying that to me in so many  
 8 words, no.  
 9 Q Do you recall them saying it to you in some other  
 10 fashion?  
 11 A Well, I have an understanding, and, actually, as I sit  
 12 here now, I don't know where that understanding came  
 13 from, but I believe that the Friends of Red Acre were  
 14 disappointed this overall project did not go forward  
 15 but were not unhappy about Mosaic Commons not being  
 16 there.  
 17 Q And that's because Mosaic Commons was low-income  
 18 housing. Isn't that correct?  
 19 A Well, I can't say that.  
 20 Q Was there any other reason that you had heard as to  
 21 why the abutter would be happy that Mosaic Commons was  
 22 not going to be coming, other than the fact that the  
 23 housing they were going to be putting in was low-  
 24 income?

- 190 -

1 MS. FETOUH: Objection.  
 2 A Part of the justification of this conservation project  
 3 was that this was a delicate aquifer area. So, many  
 4 folks saw this conservation project as a way of  
 5 protecting Stow's water supply and that the absence of  
 6 any development on Mrs. Kunelius' land was good for  
 7 the water supply in the Town of Stow, and I think the  
 8 absence of a development on that property does result  
 9 in the protection of that water supply. So, that  
 10 would be another reason why people would be not  
 11 unhappy that Mosaic Commons is not around anymore.  
 12 MR. CONROY: When you're ready, five  
 13 minutes, ten minutes?  
 14 MR. McLAUGHLIN: Sure. I'll ask one  
 15 question and we'll take a break.  
 16 Q On February 11th, there was a town Board of  
 17 Selectmen's meeting concerning TPL, and I think you've  
 18 already testified that you attended that meeting. I'm  
 19 going to put before you the following document.  
 20 (WHEREUPON, Exhibit No. 17, Stow Board  
 21 of Selectmen meeting, February 11, 2003, marked  
 22 for identification.)  
 23 Q I'd ask you to look at the second page. These appear  
 24 to be minutes, although I can't tell exactly what they

- 191 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 are. It's a February 11th document. At the top is  
2 Stow Board of Selectmen Meeting. It talks about  
3 handouts. Some of it's written in the first person.  
4 I don't know whether these are minutes or not.  
5 Pointing to the second page, the last two  
6 paragraphs say: If TPL can complete this deal  
7 without additional cost to the taxpayers, I urge  
8 you, then, to vote the way that the townspeople  
9 have demonstrated at the polls, conservation, and  
10 assign the right of first refusal under Chapter  
11 61B to Trust for Public Land. Otherwise, the  
12 proposed 40B development will have a negative  
13 irreversible effect on the Red Acre community and  
14 the Town of Stow.  
15 When you were at that meeting, were you  
16 aware that there were people who were against the  
17 40B simply because it would have a negative  
18 effect on the community?  
19 A Well, I don't recall this fellow, Drew Simmons, being  
20 there, but apparently he's one.  
21 Q So, you don't recall that discussion?  
22 A I don't recall his presentation. I don't know if he  
23 made a presentation. I've never seen this before, so  
24 I don't know what it is.

- 192 -

1 Q Okay. I'm going to put before you another document,  
2 which is a compilation of documents from the Stow  
3 Conservation Commission.  
4 (WHEREUPON, Exhibit No. 18, Stow  
5 Conservation Commission documents, marked for  
6 identification.)  
7 Q I'd ask you to look to Bate stamp No. 154, and on that  
8 Bate stamp number are Stow conservation minutes, April  
9 15, 2004. Going down to about three-quarters of the  
10 page down, Trust for Public Land/Kunelius parcel, it  
11 states: Craig MacDonnell, of the Trust for Public  
12 Land, TPL, and Carol Sommerlad, of the Friends of Red  
13 Acre, requested a meeting with the Commission to give  
14 them an update on their progress with the Kunelius  
15 property on Red Acre Road. The Board of Selectmen  
16 assigned the right of first refusal to TPL for the 50-  
17 acre Kunelius Farm located on Red Acre, preventing a  
18 40B Co-housing development.  
19 So, you were aware, certainly, that your  
20 efforts with TPL had the effect of preventing a  
21 40B development. Is that fair to say?  
22 A Were we successful in conserving the property, the  
23 property would have been conserved and not developed.  
24 Q Under 40B.

- 193 -

1 A Correct.  
2 Q And you are aware, also, that under 40B there were no  
3 permits or variances required by Co-housing in moving  
4 forward. Isn't that correct?  
5 MS. ECKER: Objection.  
6 MS. FETOUH: Objection.  
7 A I don't know. I mean, I don't have a thorough  
8 understanding Chapter 40B.  
9 Q Well, under the provisions of the purchase and sale  
10 agreement, there were no contingencies for the  
11 obtaining of variances or permits by Co-housing.  
12 Isn't that fair to say?  
13 A Yes.  
14 Q And the only contingency under the purchase and sale  
15 agreement was for some sort of feasibility study by  
16 Co-housing. Is that fair to say?  
17 A I could go back and double-check the contract if you'd  
18 like.  
19 Q You don't recall offhand. Is that your testimony?  
20 A Well.  
21 Q That's all right.  
22 A It's late in the day and I've been looking at a lot of  
23 documents. I'd be happy to go back and take a look at  
24 it.

- 194 -

1 Q No, that's all right. Do you recall, when you had a  
2 discussion with Mrs. Kunelius, that she told you that  
3 the reason that she agreed to the Co-housing purchase  
4 price of \$1,116,900 was because, in effect, while it  
5 was less than she wanted, there was a certainty of  
6 collection because it was a 40B and did not require  
7 any variances or permits? Do you remember her telling  
8 you that?  
9 A No.  
10 Q As you sit here today, are you testifying that she did  
11 not tell you that or that you do not remember that?  
12 A I have no recollection of her saying that.  
13 Q If she were to testify that she did say that, would  
14 you testify that she did not?  
15 MR. CONROY: Objection.  
16 MS. FETOUH: Objection.  
17 MS. ECKER: Objection.  
18 Q Or that you did not remember it?  
19 A I would be surprised to hear that testimony.  
20 Q Do you recall anything in a discussion with her  
21 concerning the fact that the certainty of payment with  
22 Co-housing under the 40B ensured that her retirement  
23 would be available to her? Do you recall anything  
24 like that?

- 195 -

1 A I remember a reference to retirement. I don't recall  
2 the reference being in the context of Chapter 40B.  
3 Q Do you recall her telling you that she had no money?  
4 A No.  
5 Q Did you ever go out on the site?  
6 A Uh-huh.  
7 MR. CONROY: Yes or no.  
8 A Yes, I did go on the site.  
9 Q What was the condition of the house?  
10 A I never went in the house. I only saw it from the  
11 outside.  
12 Q What was the condition of the barn?  
13 A It needed repair.  
14 Q Was it dilapidated?  
15 A You know, the structure was still pretty good. It  
16 needed some work, but the basic timbers were fairly  
17 strong.  
18 MR. McLAUGHLIN: I'm going to read  
19 something from the complaint and I'd like you to  
20 leave.  
21 (Mr. Norris exits the room.)  
22 Q I'd like you to turn to Paragraph 46 of the complaint.  
23 It reads as follows: In the spring of 2004,  
24 MacDonnell met with Kunelius, Kunelius' counsel and

- 196 -

1 Jim Boothroyd, and a local real estate broker, David  
2 Norris, in connection with TPL's demands for a lower  
3 purchase price. During that meeting, TPL threatened  
4 and intimidated Kunelius and her counsel by stating,  
5 generally, that TPL had serious and influential  
6 connections by way of its Board of Advisors who would  
7 defend TPL against any legal action brought by  
8 Kunelius as a result of TPL's default.  
9 I'm going to stop there and continue from  
10 that point, but without commenting on Item No. 1  
11 which I've just read, do you recall attending a  
12 meeting with Kunelius, Kunelius' counsel,  
13 Mr. Kachajian, Jim Boothroyd and David Norris and  
14 others?  
15 A Is this Mr. Norris here?  
16 Q Yes.  
17 A Yes, I do remember a meeting in Boothroyd's office  
18 with them.  
19 MR. CONROY: Before you ask the next  
20 question, we've been going a long time. I'd like  
21 to take a little break before we go further.  
22 MR. McLAUGHLIN: Sure.  
23 (Recess, 4:14 P.M.)  
24 (After recess, 4:24 P.M.)

- 197 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 (Messrs. Kachajian and Norris not present)  
 2 By MR. McLAUGHLIN:  
 3 Q We were talking about the meeting, I think you said,  
 4 at Boothroyd's office. Do you remember if anyone  
 5 accompanied you from TPL to that meeting?  
 6 A I don't believe so.  
 7 Q Do you recall whether anyone from the town accompanied  
 8 you to that meeting?  
 9 MS. FETOUH: Objection.  
 10 A You know, I don't remember. There were so many of  
 11 these with various players.  
 12 Q Do you recall being assisted out of the room by one of  
 13 the individuals at that meeting because you had become  
 14 extremely angry, angry and agitated?  
 15 A No, that did not happen.  
 16 Q Do you know a Bob Wilbur?  
 17 A I do know Bob.  
 18 Q Do you recall, was Bob Wilbur at that meeting?  
 19 A Bob Wilbur was at several of these meetings. This  
 20 doesn't have a date on it.  
 21 Q You're looking at the complaint?  
 22 A Yes.  
 23 Q No, it doesn't not have a date. How well do you know  
 24 Jim Boothroyd?

- 198 -

1 A I met Jim through this project.  
 2 Q Do you recall the discussion between yourself and  
 3 Mrs. Kunelius and her representatives as being heated?  
 4 A I remember this period of time continuing, actually,  
 5 into the fall, later -- what is the date, spring of  
 6 '04? Is that right?  
 7 Q Yes.  
 8 A I remember there were discussions in the spring and in  
 9 the summer and into the fall where TPL was trying very  
 10 hard to keep this project alive, and there were a  
 11 number of meetings to do that.  
 12 Q When you say they were trying to keep the project  
 13 alive; do you recall proposing a new purchase price  
 14 for the property?  
 15 A I recall trying to put together an alternative deal.  
 16 Q And did that include a new purchase price?  
 17 A Yes.  
 18 Q And do you recall doing that on at least two  
 19 occasions?  
 20 A Yes.  
 21 Q Do you recall asking that the price be reduced to  
 22 \$900,000?  
 23 A I remember, I believe, eight hundred and nine hundred.  
 24 Q Okay. Saved me the question. Under the terms of the

- 199 -

1 purchase and sale agreement, did you believe you had  
 2 the right to change the purchase price?  
 3 A The contract was over at that point. We weren't  
 4 talking about the contract anymore.  
 5 Q So, you viewed the contract as dead at that point?  
 6 A Yes.  
 7 Q Back to the meeting. Do you recall getting into an  
 8 argument with Mr. Kachajian and then threatening him  
 9 in any way?  
 10 A I remember having a discussion where TPL was trying  
 11 very hard to come up with an alternative plan that  
 12 would get a significant amount of money into  
 13 Mrs. Kunelius' pocket, and what I remember is  
 14 that we weren't making any progress on that front  
 15 and that Mr. Kachajian and I went back and forth  
 16 on whether or not this was possible or not, and I  
 17 believe Mr. Kachajian was not encouraging this  
 18 outcome, and I was trying my best to encourage  
 19 him that it's a good opportunity for  
 20 Mrs. Kunelius.  
 21 Q And the good opportunity you're talking about is  
 22 accepting a lower purchase price. Is that fair to  
 23 say?  
 24 A Lower than the contract price.

- 200 -

1 Q And in the alternative, if she did not, that you would  
 2 not pay her anything at all and walk away.  
 3 A We had already walked away.  
 4 Q Now, back to Paragraph 46. Do you recall saying  
 5 something to the effect that TPL had serious and  
 6 influential connections by way of its Board of  
 7 Advisors who would defend TPL against any legal action  
 8 brought by Kunelius as a result of TPL's default? Do  
 9 you remember saying anything like that?  
 10 A I remember saying that we thought that, if necessary,  
 11 we would litigate this issue, because we thought we  
 12 were right, and that if we couldn't put a project  
 13 together now or then, after the contract was dead,  
 14 that we would look to our pro bono counsel to litigate  
 15 the issue, and because we thought we had a good case,  
 16 we thought we'd win.  
 17 Q And, in fact, the pro bono counsel was on your Board  
 18 of Advisors, and that was Goodwin, Procter & Hoar.  
 19 MS. FETOUH: Objection.  
 20 A Goodwin does represent us in this matter, and, you  
 21 know, whether I referred to them by name, I can't  
 22 remember.  
 23 Q You also had other counsel, pro bono counsel, on your  
 24 Board of Advisors, including Hill & Barlow?

- 201 -

1 A If it was still Hill & Barlow then. I can't remember.  
 2 Q I think it was. But you recall them being on your  
 3 Board of Advisors?  
 4 A I do. Well, not the firm. There was --  
 5 Q Someone from Hill & Barlow?  
 6 A -- a lawyer from what I think was Hill & Barlow.  
 7 Q Do you recall referring to Choate, Hall & Stewart as  
 8 your counsel in that discussion with Mr. Kachajian?  
 9 A I don't.  
 10 Q Do you recall saying to Mr. Kachajian that your pro  
 11 bono counsel could bury him because it doesn't cost  
 12 you anything and Mrs. Kunelius couldn't afford to have  
 13 counsel represent her in the long run?  
 14 A I remember saying that I thought we had a really good  
 15 case and that, if necessary, we would litigate it and  
 16 that we would win because of the strength of our  
 17 position.  
 18 Q But you do not remember saying -- are you denying that  
 19 you said to anyone at that meeting that your counsel,  
 20 your pro bono counsel, would bury Mrs. Kunelius and  
 21 anyone who tried to represent her?  
 22 A I don't know if I used the word bury, but I was  
 23 vehement in my statements that we had a very strong  
 24 case.

- 202 -

1 Q Do you recall saying that the Board of Advisors  
 2 included prominent law firms that would tie up  
 3 Kunelius for as long as it took?  
 4 A Not in those words, I don't recall, but I do remember  
 5 saying that we would litigate this to the end and that  
 6 we would win.  
 7 Q Do you recall saying that it would tie up whatever  
 8 assets she had and she couldn't possibly win,  
 9 something to that effect?  
 10 A I don't recall discussing assets. I recall discussing  
 11 the merits of the case and saying that, because of the  
 12 correctness of our position and the capacity of our  
 13 counsel, I believed we would prevail.  
 14 Q Do you recall saying to Mrs. Kunelius and the people  
 15 that were with her there that you knew she was of  
 16 limited means and that her attorney would not be able  
 17 to spend sufficient funds to win any matter against  
 18 TPL because of TPL's pro bono counsel which didn't  
 19 charge anything?  
 20 A What I can tell you is what I remember of that  
 21 meeting, in which I believe Mr. Kachajian and I  
 22 debated at length whether or not it was possible for  
 23 this project to be reconstructed, and we debated  
 24 lawyer to lawyer who would win the litigation if it

- 203 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 came.  
 2 Q How well do you know Bob Wilbur?  
 3 A I know him in a professional capacity.  
 4 Q And do you know him to be an honest person?  
 5 A I have not experienced any dishonesty from Bob.  
 6 Q Is it your testimony today, after discussing this  
 7 meeting which you attended, that you still have no  
 8 recollection of Mr. Wilbur literally forcing you out  
 9 of the room to calm you down?  
 10 A I have a very explicit understanding of what happened  
 11 that day with respect to Mr. Wilbur and it had nothing  
 12 to do with him forcing me out of the room.  
 13 Q So, you have a pretty good and explicit memory as to  
 14 some things related to this case and some meetings,  
 15 and on this particular matter, you remember the actual  
 16 specifics of whether or not Mr. Wilbur took you out of  
 17 the room. If Mr. Wilbur testified that he did, would  
 18 that surprise you?  
 19 MS. FETOUH: Objection.  
 20 MS. ECKER: Objection.  
 21 A What I will say about that is that Bob asked me to go  
 22 out to the street to talk about how to refine our  
 23 position. We went outside. Mr. Boothroyd's office is  
 24 a storefront. We were meeting in the open space. We  
 - 204 -

1 went outside, Bob and I, to discuss is it possible to  
 2 get another chunk of money on the table for  
 3 Mrs. Kunelius. We didn't discuss the hijinks or  
 4 whatever it was that went on inside. We talked  
 5 about the proposal we were trying to fashion for  
 6 Mrs. Kunelius. I discussed with Bob the  
 7 possibility of bringing additional Stow  
 8 Conservation Trust money to the table on the  
 9 sidewalk in Maynard. That was the reason we went  
 10 outside.  
 11 Q Were you yelling at Mr. Wilbur at that point, outside  
 12 on the sidewalk, do you recall?  
 13 A We were on the same team, if you will. We were trying  
 14 to keep this project together.  
 15 Q Do you recall swinging your fists and your arms in the  
 16 air when you were out on the sidewalk or during the  
 17 meeting when Mr. Wilbur left with you?  
 18 A I recall doing no such thing inside. Outside, I don't  
 19 have a recollection of whether I waved my arms in an  
 20 animated sort of way of helping me articulate what I  
 21 was saying, sort of like the way I am now, but there  
 22 was nothing intimidating about it.  
 23 MR. CONROY: Off the record?  
 24 (Brief discussion off the record)  
 - 205 -

1 By MR. McLAUGHLIN:  
 2 Q When you left the meeting, after you had your meeting  
 3 out on the sidewalk with Mr. Wilbur, did you come back  
 4 into the meeting?  
 5 A I think we did.  
 6 Q I have referred to Bob Glassman in the past. I just  
 7 want to, to give you a sense -- I don't even need to  
 8 use this as an exhibit, but just so you have an  
 9 understanding, Bob Glassman is listed on your Web site  
 10 as the founder of Wainwright Bank and is on your Board  
 11 of Advisors. I want to again turn to  
 12 Mr. Glassman and what knowledge Wainwright Bank  
 13 had of references to that line of credit.  
 14 Are you aware of any correspondence between  
 15 TPL and Wainwright Bank regarding the disclosure  
 16 of the line of credit to the state as a backup  
 17 plan?  
 18 A I am not.  
 19 Q Are you aware of any restrictions on the line of  
 20 credit as to how much money can be taken out at a  
 21 particular time?  
 22 A I am not.  
 23 Q You were aware, were you not, that Mrs. Kunelius was,  
 24 during the summer of 2003, extremely worried about the  
 - 206 -

1 status of the sale to TPL?  
 2 A I was aware from talking to her counsel that she was  
 3 concerned.  
 4 Q Did you ever call Mr. Kachajian prior to the  
 5 acceptance of the right of first refusal and say to  
 6 Mr. Kachajian or to Mrs. Kunelius, or any  
 7 representative of Mrs. Kunelius, including Boothroyd,  
 8 that it was your intention to rely on the liquidated  
 9 damage clause provision and that she should be aware  
 10 of that in case she wanted to take any steps to let  
 11 the town know of that prior to the town assigning the  
 12 right of first refusal to TPL?  
 13 MS. ECKER: Objection.  
 14 A No, I have no recollection.  
 15 Q Do you think, as an attorney, that you had any  
 16 obligation, dealing with an elderly woman, to inform  
 17 her of the likelihood or the chance that if the town  
 18 assigned the right of first refusal to TPL that TPL,  
 19 as a charitable institution, might in effect prevent  
 20 the sale to Mosaic Commons and leave Mrs. Kunelius  
 21 with no buyer?  
 22 MR. CONROY: Objection.  
 23 MS. FETOUH: Objection.  
 24 A Do I think as an attorney that I have an obligation or  
 - 207 -

1 that TPL -- I'm just trying to --  
 2 Q Well, let's start with you. You, as an attorney, do  
 3 you think you had any obligation to be up front about  
 4 the possibility that Mrs. Kunelius would be left with  
 5 \$22,000 months after the fact with no one to purchase  
 6 her property?  
 7 MR. CONROY: Objection.  
 8 MS. FETOUH: Objection.  
 9 A An attorney who happens to be working for the Trust  
 10 for Public Land doing this project or?  
 11 Q Well, why don't we do this. TPL is a charitable  
 12 institution, is it not?  
 13 A It's a non-profit.  
 14 Q Well, I asked you earlier if it was a charitable  
 15 institution, and I thought you said yes. It is not?  
 16 What's the difference between a charitable institution  
 17 and a non-profit?  
 18 MR. CONROY: Objection.  
 19 A You know, I should be accurate here. My understanding  
 20 is that it is a California not-for-profit corporation  
 21 that's registered as a 501c3.  
 22 Q And as a result, TPL has a tax-exempt status, right?  
 23 A Yes, that's my understanding.  
 24 Q And as a result of that, TPL, with its tax-exempt  
 - 208 -

1 status, is able to obtain pro bono counsel and pro  
 2 bono advice and doesn't have to count it as income.  
 3 Is that correct?  
 4 MS. FETOUH: Objection.  
 5 MR. CONROY: Objection.  
 6 A I don't really know how TPL accounts for the provision  
 7 of pro bono services.  
 8 Q Do you recall trying to convince the Town of Stow to  
 9 re-describe the involvement of TPL in the Kunelius  
 10 property after the fact so that TPL could get a tax  
 11 deduction where otherwise it could not?  
 12 MR. CONROY: Objection.  
 13 MS. FETOUH: Objection.  
 14 MS. ECKER: Objection.  
 15 A TPL -- well, I have no such recollection of any  
 16 conversation like that.  
 17 Q Do you recall writing to Ross Perry and telling him  
 18 that you would like him to re-designate TPL's  
 19 activities on the Kunelius property from activities of  
 20 lobbying to activities of advice so that you could  
 21 claim deductions and have a tax benefit for that?  
 22 A No, that's not my memory.  
 23 (WHEREUPON, Exhibit No. 19, MacDonnell  
 24 email to Perry, dated April 17, 2003, marked for  
 - 209 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEF by Kenson

1 identification.)  
 2 Q Exhibit 19 is before you. This appears to be a  
 3 letter, or an email, from Craig MacDonnell, with your  
 4 email address, to Ross and Bill. I believe it's Ross  
 5 Perry and perhaps Bill Wrigley, but I can't be sure,  
 6 but it goes to the town administrator, so it's  
 7 probably Bill Wrigley, the town administrator, in  
 8 which you, apparently, are revising letters for the  
 9 Board of Selectmen to you, in which you ask them to  
 10 write a letter on April 15, 2003, describing your  
 11 involvement as technical rather than lobbying. Do you  
 12 see that?  
 13 A I see the language under the heading Ross and Bill.  
 14 Q Now, up until April 15th, isn't it in fact true that  
 15 it was TPL's absolute intention from early January of  
 16 2003, at the latest, through the time of the  
 17 assignment, that TPL sought to acquire and control the  
 18 property known as the Kunelius Farm? Isn't that fair  
 19 to say that's what you were doing?  
 20 MR. CONROY: Objection.  
 21 A Pardon me. I just had a moment of lack of  
 22 concentration and I missed your question. Would you  
 23 mind restating it? I'm sorry.  
 24 Q Well, I'm interested here in your letter to Mr. Perry

- 210 -

1 in which you write for him, it appears, in which you  
 2 are asking Mr. Perry, and, in fact, sir, I will inform  
 3 you that he does write such a letter on April 15th or  
 4 thereafter in which the letter seems to be asking for  
 5 technical advice, and the purpose of this letter seems  
 6 to be that the reason TPL needs it is because it  
 7 enables TPL to count more of the support work as  
 8 technical assistance rather than lobbying for IRS  
 9 purposes.  
 10 MS. FETOUH: Objection.  
 11 Q Now, in fact, TPL was lobbying for that property.  
 12 Isn't that fair to say?  
 13 MR. CONROY: Objection.  
 14 MS. FETOUH: Objection.  
 15 A TPL typically asks boards of selectmen for these kinds  
 16 of letters because the IRS recognizes the work that  
 17 TPL does in response to requests from boards of  
 18 selectmen as technical assistance rather than lobbying  
 19 if the record so reflects that. So, it's a normal,  
 20 every-project request that we ask boards of selectmen  
 21 to do this letter.  
 22 (Mr. Kachajian enters the room.)  
 23 Q Well, you may recall that I asked you at the beginning  
 24 of this deposition how you got involved with the

- 211 -

1 Kunelius property, and your testimony was through  
 2 Mr. Christianson concerning the possibility of  
 3 establishing a conservation restriction on the  
 4 property. Is it your testimony that the  
 5 application for \$350,000 from the state was  
 6 advice work on behalf of the Town of Stow, or was  
 7 it lobbying?  
 8 MR. CONROY: Objection.  
 9 MS. FETOUH: Objection.  
 10 A I don't think I have a position on that. I mean, I  
 11 have never thought of that in one way or another, so  
 12 forgive me here, late in the day, for not having a  
 13 facile answer to that question.  
 14 (WHEREUPON, Exhibit No. 20, Friends of  
 15 Red Acre letter to Board of Selectmen, dated June  
 16 6, 2003, marked for identification.)  
 17 Q These two documents, which are Exhibit 20, were  
 18 together when we received them, so we kept them  
 19 together. The first one is from Friends of Red Acre  
 20 to the Town of Stow, and it is a letter to the Board  
 21 of Selectmen of the Town of Stow signed by three people,  
 22 apparently, from the Friends of Red Acre. It's dated  
 23 June 6th. I'm going to ask you to just take a look at  
 24 that letter, because it would seem that this letter

- 212 -

1 indicates that the Friends of Red Acre believed that  
 2 the deal was done as of June 6, 2003, and I would ask  
 3 you to read the letter and then tell me whether you  
 4 have any understanding concerning this letter.  
 5 A I read it.  
 6 Q Had you seen this before?  
 7 A I don't remember seeing it before.  
 8 Q Is it fair to say that the Friends of Red Acre had  
 9 been approached by you for fund-raising purposes?  
 10 A Yes.  
 11 Q Is it also fair to say that at some point in the fund-  
 12 raising process you approached them and told them not  
 13 to fund-raise because, for other reasons, you had  
 14 decided not to go forward with the development?  
 15 A I have no memory of telling Friends of Red Acre not to  
 16 fund-raise during the period of time that was sort of  
 17 relevant to the possibility of the project going  
 18 forward.  
 19 Q Is it your testimony that you did not tell them, or is  
 20 it your testimony that you have no recollection of not  
 21 telling them to fund-raise, of telling them not to  
 22 fund-raise, because you didn't want to go forward with  
 23 the project?  
 24 A I did not tell them not to fund-raise because TPL did

- 213 -

1 not want to go forward with the project.  
 2 Q So, if any of these people were to testify, any of  
 3 these people listed here were to testify, that in fact  
 4 you did discourage them from fund-raising because TPL  
 5 did not want to go forward with the project, would  
 6 they be lying?  
 7 MS. FETOUH: Objection.  
 8 MS. ECKER: Objection.  
 9 MR. CONROY: Objection.  
 10 A I would be surprised.  
 11 Q Do you know Michael Labosky?  
 12 A I have met Michael, yes.  
 13 Q Did you ever have any discussions with him in which  
 14 you discouraged him from fund-raising?  
 15 A The reason I'm pausing is that over the course of, you  
 16 know, more than one year we talked about this project  
 17 a lot, this group of people and TPL. Towards the end  
 18 of that period of time, when the project was falling  
 19 apart, TPL discussed with Friends of Red Acre the fact  
 20 that it was falling apart, and during those  
 21 conversations, when the horizon was very dark, it made  
 22 sense for all of us to fold our tent.  
 23 Q Well, do you recall them questioning you as to why TPL  
 24 was not using the money that TPL said it had in its

- 214 -

1 own funds or by way of line of credit in order to  
 2 effectuate the sale?  
 3 A Generally, I remember having discussions with this  
 4 group about how to keep the project together,  
 5 including where was the money going to come from, is  
 6 it borrowed, is it privately fund-raised. There were  
 7 many, many conversations along those lines.  
 8 Q But do you remember them questioning you as to why you  
 9 would not use the line of credit or any other funds  
 10 that you had referred to as capital?  
 11 A Yes.  
 12 (Mr. Norris enters the room.)  
 13 Q And do you recall them being angry at you or  
 14 dissatisfied with you because they felt that you had  
 15 misled them concerning the availability of funds that  
 16 TPL itself had or could obtain in order to effectuate  
 17 the purchase?  
 18 A I remember some difficult conversations about the  
 19 future of the project.  
 20 Q But not so much --  
 21 A I'm trying to answer your question.  
 22 Q I know, but you have a distinct method of answering  
 23 surrounding issues. I'm talking about just the issue  
 24 of were they angry at you for not using the line of

- 215 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 credit or such other capital funds as you had  
2 described to them previously, just that issue, line of  
3 credit or capital funds.  
4 A Do I remember anger related to line of credit?  
5 Q Not being used.  
6 A Not specifically.  
7 Q Generally, do you remember it?  
8 MR. CONROY: Remember anger?  
9 Q Anger by the members of the Friends of Red Acre  
10 because they were upset that you were not using either  
11 the line of credit or such other capital funds as you  
12 had referred to in the past with them.  
13 A My memory regarding their frustration regarding the  
14 pace of the project was, really, the frustration we  
15 were all having with the private fund-raising. There  
16 was a sense going into this project that there was a  
17 very significant amount of private fund-raising easily  
18 had in the Town of Stow in a small collection of  
19 foundations and that when it became apparent later on  
20 in the project that those identified sources of funds  
21 and the dollars assigned to those funds were  
22 overstated, there was a disconnect between TPL and the  
23 Friends of Red Acre and there was upset over that  
24 question.

- 216 -

1 Q Was there also upset over the disconnect between your  
2 description of private market funds and the line of  
3 credit which you were now refusing to use?  
4 MS. FETOUH: Objection.  
5 A Okay. I've tried to testify that my memory regarding  
6 this upset is not specific as to the line of credit.  
7 It's regarding sort of the overall progress of the  
8 project.  
9 Q Do you recall reviewing an excerpt from your Web site  
10 which referred to the ability of TPL to bridge the gap  
11 when the town couldn't raise funds?  
12 A The one you showed me earlier today?  
13 Q Yes.  
14 A Yes, I do remember that.  
15 Q Do you recall Friends of Red Acre being angry at you  
16 concerning your refusal to bridge the gap because you  
17 had told them of TPL's ability to do so and it was  
18 because you had that they had spent time trying to  
19 fund-raise?  
20 A My memory of this disconnect is related to the debate  
21 between finances and financing, which was a question  
22 of is it possible to raise the money necessary for the  
23 project versus how do you finance it.  
24 Q Well, do you not recall that the \$22,000 that was paid

- 217 -

1 to Mrs. Kunelius by TPL was raised by the Friends of  
2 Red Acre and that they were concerned and upset with  
3 you once you decided that you were not going to borrow  
4 the money from the line of credit and/or from your  
5 private capital markets that you had referred to, and  
6 there was an issue as to whether or not -- why you  
7 were doing that when you had caused them to raise the  
8 \$22,000, which was the entire amount of money that was  
9 paid to Mrs. Kunelius?  
10 MS. FETOUH: Objection.  
11 MR. CONROY: Objection.  
12 A I'd like to answer your question, but I really -- it's  
13 so long that I'm afraid I don't understand it.  
14 Q You would agree with me that \$19,000 has been paid to  
15 Mrs. Kunelius under the terms of the purchase and sale  
16 agreement.  
17 A As I sit here today, I'm not certain how much has been  
18 paid. I know that a significant amount has been paid.  
19 Q Would you agree with me that the Friends of Red Acre  
20 had raised \$22,000 and given it to TPL in order to  
21 fund the -- what's the money called?  
22 MR. KACHAJIAN: Earnest money?  
23 Q Earnest money. That \$22,000 came from the Friends of  
24 Red Acre.

- 218 -

1 A I know the Friends of Red Acre raised some money for  
2 the purposes of making deposits. I don't know how  
3 much it was as I sit here today.  
4 Q Did you give back any money to the Friends of Red Acre  
5 that they raised that was not used for earnest money  
6 payments to Mrs. Kunelius?  
7 A I don't believe so.  
8 Q Is it fair to say that the Friends of Red Acre were  
9 very upset with you concerning this issue of TPL not  
10 obtaining funds sufficient from their own resources,  
11 TPL's own resources, and that, essentially, the  
12 Friends of Red Acre believed that you had misled them?  
13 Do you recall any discussions concerning that?  
14 A My memory is that I had discussions with folks in  
15 Friends of Red Acre about the same issues that we've  
16 talked about today, the question being whether or not,  
17 ultimately, any dollars would materialize that could  
18 pay off any potential amount.  
19 Q I'm going to have you look at Exhibit 14 again, if you  
20 would.  
21 A Yup.  
22 Q I want you to look at Bate stamp No. 443.  
23 A Yes.  
24 Q Item No. 6. We have answers to 6A through D. Under

- 219 -

1 Item No. C, letter C, is a note from the town relative  
2 to the four hundred thousand dollar promissory note,  
3 with seven percent interest, paid in full within 24  
4 months, with monthly interest payments of \$2,333, TPL  
5 states, to be paid from privately raised funds or from  
6 the sale of the houses on the property. Do you see  
7 that?  
8 A Yes.  
9 Q So, as to the issue of the \$400,000, is it fair to say  
10 that, in fact, TPL absolutely intended to avail  
11 themselves of the four hundred thousand dollar loan  
12 from Mrs. Kunelius and that your method of repaying it  
13 within 24 months was either the sale of the houses or  
14 privately raised funds?  
15 MS. FETOUH: Objection.  
16 MS. ECKER: Objection.  
17 MR. CONROY: Objection.  
18 A With reference to Exhibit 14, Paragraph 6C, and the  
19 bold sentence after the letters TPL, that sentence was  
20 intended to communicate that the total of the four  
21 hundred, as a whole, could be raised. We intended it  
22 to be raised from those sources when I put this  
23 together. That was our intention at that time.  
24 Q What four hundred was it?

- 220 -

1 A Did you ask me about 6C?  
2 Q Yes.  
3 A Okay. That's the one.  
4 Q The four hundred thousand promissory note. You're  
5 talking about raising money to pay off the four  
6 hundred thousand dollar promissory note to  
7 Mrs. Kunelius.  
8 A Correct. Well, actually, I'd like to clarify that,  
9 because the further along we got in this process,  
10 whether our decision-making was correct or not about  
11 the availability of the mortgage itself -- we've  
12 talked about that a lot today -- it was our sense that  
13 that mortgage was not available to us and that,  
14 instead, TPL contemplated adding on to the four  
15 hundred thousand the interest that Mrs. Kunelius would  
16 have earned over the term, and I think that was  
17 \$56,000.  
18 So, I think our planning, for planning  
19 purposes, four hundred was not four hundred. The  
20 four hundred was 456,000, which we would need to  
21 deliver at the time of closing.  
22 Q But that was the term of the purchase and sale  
23 agreement. Is it your testimony -- I'm not trying to  
24 put words in your mouth. Your testimony is, as I now

- 221 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 understand it, that you simply changed your mind about  
2 the terms of the purchase and sale agreement and did  
3 not want to borrow the money, the \$400,000. Am I  
4 right?

5 MS. FETOUH: Objection.

6 A No.

7 Q Let's look at Exhibit 12, I'm sorry, Exhibit 13. On  
8 Exhibit 13, which is the September 9th letter from you  
9 to Peter Kachajian --

10 (Mr. Kachajian exits the room.)

11 Q Strike that. Let's look at the third paragraph, which  
12 says, five lines down: TPL's Board of Directors will  
13 not approve any borrowing to bridge a fund-raising gap  
14 because the prospects of raising funds necessary to  
15 repay the loan required are not encouraging. Further,  
16 any bridge loan would be for an amount greater than  
17 the land would be worth even if the subdivision were  
18 approved.

19 Now, isn't it in fact true, sir, that what  
20 you have said today has not been accurate, in  
21 that one of the primary reasons that you did not  
22 go forward was that you did not like the purchase  
23 price of the property?

24 MS. FETOUH: Objection.

- 222 -

1 A Is completely untrue.

2 Q So, when you state that the amount of the loan -- any  
3 bridge loan would be for an amount greater than the  
4 land would be worth even if the subdivision were  
5 approved, let me ask you something. How much money  
6 were you talking about when you said a bridge loan?  
7 Were you talking about the \$400,000?

8 A As I sit here today, I don't know how much money I was  
9 talking about.

10 Q And you would agree, wouldn't you, that the 8.57 acres  
11 had a price on it of \$1,116,000 and change for 8.57  
12 acres? Is that correct?

13 A TPL always viewed this as a 50-acre project.

14 Q But nothing in the P&S agreement gave a 50-acre  
15 project to Mosaic Commons or Co-housing. Isn't that  
16 correct?

17 MS. FETOUH: Objection.

18 MS. ECKER: Objection.

19 MR. CONROY: Objection.

20 A Well, I think there's a legal question out there,  
21 whether or not the allocation, 8.57 versus 50,  
22 survives the assignment in the exact same form it  
23 existed prior to.

24 Q So, you're disagreeing with the allocation of the

- 223 -

1 purchase price that is outlined in the terms of the  
2 purchase and sale agreement, which specifically states  
3 that Co-housing was to get 8.57 acres and the town, by  
4 way of gift, would get the remaining portion, and your  
5 testimony now is that you did not agree with that  
6 allocation. Is that your testimony?

7 MS. FETOUH: Objection.

8 MS. ECKER: Objection.

9 MR. CONROY: Objection.

10 A No.

11 Q Is it your testimony that you always viewed it as, TPL  
12 always viewed it as, a 50-acre project and, therefore,  
13 you do not agree with the allocation as to the  
14 \$1,116,900 that was applicable to the 8.57 acres?

15 MS. FETOUH: Objection.

16 MS. ECKER: Objection.

17 MR. CONROY: Objection.

18 A I'm saying something less than what you would like me  
19 to say.

20 Q Do you recall telling people that Mosaic Commons  
21 overpaid for the property?

22 A Yes.

23 Q And that's because you believed that it wasn't a good  
24 deal for Mosaic Commons but it was a good deal for

- 224 -

1 Mrs. Kunelius. Isn't that correct?

2 A I have no idea whether it was a good deal for Mosaic  
3 Commons.

4 Q Well, if Mosaic Commons overpays for the property,  
5 it's probably not a good thing for Mosaic Commons, is  
6 it?

7 MS. FETOUH: Objection.

8 A I would say that Mosaic Commons paid more than fair  
9 market value, but it may be a good deal for them  
10 because they have the power of 40B.

11 Q And it was certainly a good deal for Mrs. Kunelius if  
12 you believe she got better than market value. Is that  
13 correct?

14 MS. FETOUH: Objection.

15 A I would agree with that.

16 Q So, a component of your refusal, TPL's refusal, as  
17 reflected by your letter of September 9th, was that  
18 you did not believe you could borrow an amount of  
19 money that would not exceed the value of the 8.57 acre  
20 parcel. Am I correct on that?

21 A If you're asking me to explain what the third  
22 paragraph of Exhibit 13 is, it's my testimony that I  
23 don't recall the number of dollars that I was  
24 referring to, as I sit here today, in that letter that

- 225 -

1 I wrote four years ago.

2 Q Well, maybe you can explain this to me, sir. You say,  
3 I mean, there has to be some amount of money that  
4 would be applicable to the loan that you're talking  
5 about bridging, and by any stretch of the imagination,  
6 it's hard for me to consider it being more than  
7 \$800,000, meaning, subtract the 400,000, 300- and  
8 100,000 from the purchase price that you knew you were  
9 going to get, eventually, from the town. You're left  
10 with approximately \$800,000. Now, if that's the case,  
11 doesn't this say that any bridge loan would be for an  
12 amount greater than the land would be worth even if a  
13 subdivision were approved, which means you did not  
14 like the value of the deal and you wouldn't borrow  
15 even \$800,000 because you did not think that the land  
16 would be worth even \$800,000?

17 MR. CONROY: Objection.

18 MS. ECKER: Objection.

19 MS. FETOUH: Objection.

20 A That's not really what I'm saying. I cannot  
21 characterize any further what I believe, as I sit here  
22 today, this sentence means.

23 Q Well, what did you expect Peter Kachajian to think  
24 when he read this if you don't understand?

- 226 -

1 A Well, if it was September 9, 2003, I could tell you  
2 what I meant, but it's four years later.

3 Q Let's go forward to the next sentence, which says:  
4 Essentially, this would be asking TPL for an unsecured  
5 loan based on weak fund-raising prospects with no  
6 backup plan to repay the loan.

7 Tell me, if you would, who was asking TPL  
8 for an unsecured loan? Was anybody asking TPL  
9 for an unsecured loan?

10 A What that sentence referred to was the notion that  
11 borrowing against an uncertain fund-raising future  
12 was, on the basis of a line of credit, was unwise if  
13 TPL did not believe that the fund-raising prospects  
14 would materialize.

15 Q So, you were concerned -- well, this says this would  
16 be asking TPL for an unsecured loan. Who was asking  
17 TPL? I just don't understand.

18 A It's a hypothetical notion that it would be imprudent  
19 for TPL to invest money in this project without a  
20 reasonable expectation of capital takeout, whether  
21 that be the sale of assets or private fund-raising.

22 Q I'm going to put before you a document that is  
23 attached to the complaint as Exhibit 9. We'll re-mark  
24 it as Exhibit 21 to the complaint.

- 227 -

## DEPOSITION OF CRAIG MACDONNELL

1 (WHEREUPON, Exhibit No. 21, Pelletier  
2 letter to Stow Board of Appeals, dated September  
3 25, 2003, marked for identification.)  
4 MR. McLAUGHLIN: I don't know what you  
5 want to do. I've still got a substantial amount  
6 here, so we'll keep plugging along here as long  
7 as we can.  
8 Q Exhibit 21 appears to be a letter from regional  
9 counsel, Denise Pelletier, to the chairman of the Stow  
10 Board of Appeals on September 25th, in which you're  
11 asking for variances to be dropped, I should say, to  
12 drop your application for variances, and, this, some  
13 almost three weeks after your letter to Mr. Kachajian.  
14 During the time that you were applying for  
15 these variances, particularly, in September, I  
16 thought you already said that if it was  
17 September, the deal was done. It was over. You  
18 were looking at some new deal. Am I correct in  
19 my characterization of your testimony?  
20 A As I've testified earlier, TPL's confidence level in  
21 this project waned gradually over a period of time.  
22 There was no decision point, so that over the summer  
23 of 2003, it became increasingly untenable that this  
24 project could go forward. There was a moment in time

- 228 -

1 when it became particularly problematic, and I think  
2 that moment probably was when we determined that the  
3 subdivision was hugely problematic, and you recall  
4 earlier today we talked about sort of the early  
5 analysis of when we were trying to just, as lawyers,  
6 figure out the best route to subdivide the property,  
7 and then I said later on another problem arose that  
8 was even more problematic.  
9 What happened in the summer -- let me just  
10 finish the thought. In the summer, we learned  
11 something that we hadn't known before, which was  
12 that the two parcels, 142 and 144, were not owned  
13 by separate entities. It was our understanding  
14 before that time that they were owned by separate  
15 entities and that the common law doctrine of  
16 merger would not apply, and so that so long as we  
17 could get the variances that we were seeking, the  
18 future existence of 142 and 144 could be created  
19 for purposes of sale. Somewhere along the path,  
20 it became apparent to us that, in fact, 142 and  
21 144 were owned by the same entity, the doctrine  
22 of merger applied, and there was no way to  
23 subdivide it.  
24 Q There was no way to subdivide based upon your plan for

- 229 -

1 the property rather than the plan for Co-housing and  
2 Mosaic Commons, correct?  
3 A The proposal for what we intended to do, the variances  
4 we sought, would be rejected. So, it was important  
5 for us not to have that rejection made. In effect, we  
6 were thinking of Mrs. Kunelius' property rights at  
7 this point in time and didn't want an adverse variance  
8 decision on the record, not only for Mrs. Kunelius'  
9 sake but also for the possibility of the future in  
10 which the town, TPL, everybody else, could reconfigure  
11 this project and make it go forward.  
12 Q Are you familiar with how much cash on hand TPL  
13 Massachusetts has at any particular point in time?  
14 A No.  
15 Q Do you have even a general sense of how much cash on  
16 hand TPL has right now?  
17 A TPL, nationally?  
18 Q No, Massachusetts.  
19 A I do not know.  
20 Q Could you tell me within a half a million dollars?  
21 A No.  
22 Q As the director of the Massachusetts division of TPL,  
23 you do not know how much money is in your checking  
24 account, approximately?

- 230 -

1 A In any given moment, no, because a lot of money goes  
2 in and out to do projects all the time.  
3 Q I understand. But within general terms, do you carry  
4 a balance in your checking account of a half a million  
5 dollars?  
6 A I just told you that I don't know what the balance is,  
7 and I don't know what it normally is. It fluctuates  
8 hugely.  
9 Q So, do you have any idea of what amounts TPL has in  
10 other assets, liquid assets, nationally?  
11 A I do not.  
12 Q Have you ever looked at TPL's financial statements to  
13 determine how much money they have in their accounts?  
14 A Not closely.  
15 Q But you've looked?  
16 A I mean, I've seen the balance sheet.  
17 Q Have you ever considered or did you consider using any  
18 of TPL's assets beyond the line of credit in order to  
19 fund the purchase from Mrs. Kunelius?  
20 A No.  
21 Q Did you ask anybody if there were funds available that  
22 could be used? I'm talking about liquid assets, such  
23 as cash or certificates of deposit or any other types  
24 of assets, which could be liquidated within some

- 231 -

1 reasonable period of time in order to effectuate the  
2 purchase.  
3 A I don't recall.  
4 Q Is it your testimony today that you do not know  
5 whether TPL, nationally, has \$800,000 in cash or  
6 liquid assets available to it, or had \$800,000 in cash  
7 or liquid assets available to it, that it could have  
8 used at the time that TPL was required to purchase the  
9 property from Mrs. Kunelius?  
10 A That's not my testimony.  
11 Q So, is it possible that TPL did have cash or liquid  
12 assets sufficient to make the purchase from  
13 Mrs. Kunelius?  
14 A I just don't know what the state of TPL's liquid  
15 assets were in that period of time.  
16 Q Do you have to submit a budget in your role as a  
17 director of Massachusetts?  
18 A Yes.  
19 Q And with that budget, do you consider sources and uses  
20 of funds on a daily, weekly, monthly, yearly basis?  
21 A Quarterly.  
22 Q Quarterly. And when was the last time you did that?  
23 Would it be December 31?  
24 A TPL's fiscal year ends at the end of March. So, we

- 232 -

1 are coming up on the end of our fiscal year.  
2 Q So, you're actually considering a budget right now for  
3 next year, are you not?  
4 A Yes.  
5 Q Is it your testimony today that in establishing that  
6 budget, as you are apparently doing currently, you  
7 have no idea of how much money is in the cash  
8 reserves, the bank accounts, the checking accounts,  
9 the savings accounts, of TPL for Massachusetts?  
10 A TPL begins every year at zero and ends, hopefully,  
11 every year at zero. We don't have an endowment. This  
12 is not an organization that has cash sitting around  
13 ready to throw at projects. This is a very squeaky  
14 organization when it comes to spending money. We're a  
15 conservation organization. We just don't have that  
16 much. So, in the budgeting process, we think very  
17 carefully about anticipated revenue, anticipated  
18 expenses, going forward.  
19 Q When your line of credit was obtained for six million  
20 dollars, what did TPL give as collateral for that, if  
21 you know?  
22 A I don't know.  
23 Q Is it an unsecured line of credit?  
24 A It very well may be.

- 233 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 Q Would that suggest to you that Wainwright Bank has  
2 some confidence in the ability to be repaid on a six  
3 million dollar line of credit?  
4 MS. FETOUH: Objection.  
5 A I don't know what Wainwright is thinking.  
6 (WHEREUPON, Exhibit No. 22, MacDonnell  
7 letter to Kachajian, dated July 6, 2004, marked  
8 for identification.)  
9 Q I want to have you look at the next exhibit.  
10 THE WITNESS: Before you ask that  
11 question, could I take a two-minute break?  
12 MR. McLAUGHLIN: Sure.  
13 (Recess, 5:24 P.M.)  
14 (After recess, 5:29 P.M.)  
15 (All parties present)  
16 By MR. McLAUGHLIN:  
17 Q Exhibit 22, this is also attached to the complaint as  
18 Exhibit 11 to the complaint, and it is a July 6, 2004,  
19 letter from you, sir.  
20 MR. KACHAJIAN: Is that to me?  
21 MR. McLAUGHLIN: To Peter Kachajian,  
22 yes, see you later.  
23 (Mr. Kachajian exits the room.)  
24 Q With attachments. And the attachments have an A and a  
- 234 -

1 B on them, and I'm wondering first, sir, whether you  
2 recall this letter.  
3 A I do.  
4 Q And you authored this letter?  
5 A I did.  
6 Q And did you assemble Exhibit A and Exhibit B to this?  
7 A Did I attach them?  
8 Q No, did you assemble the information in Exhibit A and  
9 Exhibit B? Is that your work product or is that  
10 someone else's work?  
11 A It's like a little software program that generates  
12 these tax benefit analyses. It's not entirely my work  
13 product. It's relying on the built-in analysis.  
14 Q Now, is it fair to say that -- well, let's look at the  
15 second page of your letter, beginning with the first  
16 paragraph, third line. It says: The first such  
17 proposal contemplated a partnership with the town and  
18 Mrs. Kunelius whereby TPL would pay her eight hundred  
19 thousand for the property. The town would invest  
20 three hundred thousand.  
21 So, does that mean that Mrs. Kunelius gets a  
22 million-one, or does that mean that Mrs. Kunelius  
23 gets eight hundred thousand and the town then  
24 pays back TPL three hundred thousand so that TPL  
- 235 -

1 is paying five hundred thousand?  
2 A It imagined paying \$800,000 for the property.  
3 Q And the town's investment was a repay to TPL of three  
4 hundred thousand, is that correct?  
5 A Well, in exchange for the three hundred thousand which  
6 had previously been approved, the CPC money, the town  
7 would receive the conservation parcel.  
8 Q So, this first paragraph is an offer of eight hundred  
9 thousand to Mrs. Kunelius. Down at the bottom of the  
10 page, in the middle of the page, third paragraph, it  
11 says: It's my understanding that the purchase price  
12 could be improved to nine hundred thousand. Do you  
13 see that?  
14 A Yes, I do.  
15 Q So, in order for you to move forward, meaning TPL,  
16 your letter indicates that Mrs. Kunelius was going to  
17 have to accept one of these two offers in order for  
18 TPL to move forward with it. Is that a fair  
19 description of the purpose of the letter?  
20 A The purpose of the letter was to advise Mr. Kachajian  
21 that TPL continued to have an interest in this  
22 conservation project, that it wanted to continue to  
23 work hard to bring as much money as possible to  
24 Mrs. Kunelius, and that the hope was to be able  
- 236 -

1 to bring in the neighborhood of eight or nine  
2 hundred thousand dollars to her.  
3 Q Where was the \$500,000 coming from that resulted from  
4 the \$800,000 minus the payback of three hundred to  
5 TPL? That meant that TPL had to come up five hundred.  
6 Where were you proposing that \$500,000 come from?  
7 A We would hope to sell the two lots, 142 and 144.  
8 Q And that was it, no money from TPL in this deal  
9 whatsoever. It was the sale of the lots from  
10 Mrs. Kunelius' property and the money from the  
11 town of \$300,000 and nothing from TPL. Is that  
12 correct?  
13 A In this proposal, in the first paragraph, on Page 2, I  
14 believe the two lots plus three hundred would come up  
15 to eight hundred.  
16 Q So, in other words, TPL was going to put nothing in it  
17 themselves?  
18 MS. FETOUH: Objection.  
19 Q For the purchase price.  
20 A It was never contemplated for TPL to put its own money  
21 in the deal.  
22 Q Well, it's either its money or capital market money or  
23 the line of credit. I'm counting that as TPL's money  
24 for the purposes of my question, but let me just move  
- 237 -

1 on. Let me just move on. You don't have to answer  
2 that.  
3 MR. CONROY: I'll make it clear that  
4 he's not answering the question.  
5 MR. McLAUGHLIN: All right.  
6 (WHEREUPON, Exhibit No. 23, MacDonnell  
7 letter to Perry, dated January 5, 2003, marked  
8 for identification.)  
9 Q Is it fair to say that in the eight hundred thousand  
10 dollar offer, none of the \$800,000 came from TPL's own  
11 funds, that is, their own assets, cash or the sale of  
12 stock or anything else?  
13 A Well, this was a proposal, and because it was still in  
14 the proposal stage, it's not clear to me whether the  
15 five hundred that would come from the sale of the two  
16 lots would be fronted by TPL and then recovered from  
17 the sale or whether the sale of the two lots would  
18 have to precede it.  
19 Q And where would the money come from if it was fronted  
20 by TPL? That's my question.  
21 A That was not proposed.  
22 Q Well, you could borrow it. Isn't that fair to say?  
23 A TPL could borrow that money. Correct, we could borrow  
24 that money.  
- 238 -

1 Q Fine.  
2 A If there was a reasonable likelihood of return to pay  
3 back the loan, the same issue we've talked about all  
4 day.  
5 Q So, that offer wasn't an offer, because you didn't  
6 know if you could sell the units, the two units. So,  
7 it was contingent upon whether there was a likelihood  
8 of selling the two units, correct?  
9 MS. FETOUH: Objection.  
10 MR. CONROY: Objection.  
11 A No, that's not what I just said.  
12 Q So, let me make sure I understand. You could borrow  
13 money providing there was an assurance that you could  
14 pay it back. Is that fair to say?  
15 A Like any business.  
16 Q And the only source of being assured of paying back  
17 the money was the sale of the two units. Is that  
18 correct?  
19 A No.  
20 Q So, then there was another source, and that was what?  
21 A Private fund-raising, if the private fund-raising was  
22 substantiated. Is it likely to come forward?  
23 Q So, this wasn't an offer. It was a proposal for which  
24 you were not certain that you could perform under that  
- 239 -

## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 proposal because you didn't know the likelihood of  
2 fund-raising. Is that fair to say?  
3 MS. FETOUH: Objection.  
4 A No. No, not at all. This letter talks about a  
5 proposal that was previously on the table. This  
6 letter, the purpose of this letter, is to talk about  
7 the next proposal, a better proposal.  
8 Q And that's the nine hundred thousand dollar proposal?  
9 A Right.  
10 Q All right. Let me simply ask you a few questions  
11 concerning the complaint and your understanding of  
12 your relationship with the town.  
13 I presume as an attorney that, when you went  
14 to law school, you studied partnership law. Is  
15 that fair to say?  
16 A Well, I'm trying to remember whether I took that  
17 course.  
18 Q Well, Cornell most certainly teaches that course.  
19 MS. FETOUH: Objection.  
20 Q Well, she doesn't think Cornell does, but --  
21 MS. FETOUH: No, I went to a comparable  
22 school. We didn't learn that.  
23 MR. McLAUGHLIN: There's nothing  
24 comparable to Cornell.

- 240 -

1 Q You don't have to answer that question. You're aware,  
2 are you not, that Mrs. Kunelius has alleged that there  
3 was a joint venture, or a partnership, between TPL and  
4 the town. Is that fair to say?  
5 A I've seen the word -- that there's the allegation?  
6 Q Yes.  
7 A I've seen the word partnership in the complaint.  
8 Q And you are aware, are you not, that TPL has denied  
9 that there is a partnership?  
10 A I am aware of that.  
11 Q And you are aware, also, that you denied there was a  
12 partnership.  
13 A I am aware of that.  
14 Q Okay. Let's look at the January 5th letter from you  
15 to the town, to Ross Perry of the Board of Selectmen,  
16 and I would ask you to look at the fifth line up from  
17 the bottom. On the right-hand side, it says: All our  
18 projects are done at the request of and in partnership  
19 with entities that become permanent owners of the  
20 property. The two most important roles we play in  
21 this process are, one, we make sure that our  
22 obligations to our partners are met and, two, to raise  
23 funds necessary for the transaction from a combination  
24 of private and public sources.

- 241 -

1 Now, when you used the word partnership on  
2 the first page of your January 5th letter, which  
3 is Exhibit 25, were you referring to a  
4 partnership with the town?  
5 A I was using the term in its colloquial sense and not  
6 in its formal legal sense.  
7 Q There is a colloquial sense to partnership? And that  
8 would be what?  
9 A Working together on something less than a legal  
10 partnership.  
11 Q Well, is it fair to say that, in a partnership, would  
12 you expect the individuals or parties to a partnership  
13 to have a financial stake in a partnership?  
14 MS. FETOUH: Objection.  
15 MR. CONROY: Objection.  
16 Q An investment, something that --  
17 A A legal partnership, you're talking about?  
18 Q Yes.  
19 A Not always.  
20 Q Doesn't have to have one?  
21 A Correct.  
22 Q Would you expect that there would be some contractual  
23 stake in a partnership where the parties enter into a  
24 written agreement by which they declare their partner

- 242 -

1 status to each other?  
2 A Sometimes but not always.  
3 Q Well, let me just ask you to look at your letter of  
4 January 5th to the town, and the second full paragraph  
5 says: For TPL to consider a financial and contractual  
6 stake in this project, we would need to secure our  
7 involvement in a way that will enhance the likelihood  
8 of sufficient public and private funds being available  
9 and ensure a strong conservation and community  
10 outcome.  
11 Now, this says, as I understand it, that TPL  
12 intended to have a financial stake in the  
13 project. Am I wrong in my reading of that, sir?  
14 A No.  
15 Q So, what was the financial stake of TPL in the project  
16 when the project was for the acquisition of a  
17 1,116,900 dollar piece of property? What was your  
18 financial stake, TPL's?  
19 A Well, it would be the out-of-pocket dollars that we  
20 spent in pursuit of the deal, together with the value  
21 of the services that we provided through our staff  
22 that would otherwise be working on some other project.  
23 Q Well, now, from a matter of your standing as a non-  
24 profit tax-exempt entity, do you bill services of your

- 243 -

1 staff on an hourly rate in order to establish a  
2 financial investment in a particular project?  
3 A We analyze the time commitments of our staff on the  
4 basis of dollars every year, every project, all the  
5 time.  
6 Q What was the contractual stake that you were entering  
7 into as a partner with the town that you're referring  
8 to here?  
9 A It makes reference to a contractual stake in the  
10 project that I think we were contemplating. This is  
11 before the assignment?  
12 Q Yeah.  
13 A We're talking about stepping into the shoes of Co-  
14 housing Resources.  
15 Q So, it was a financial stake with the town and a  
16 contractual stake with who, Mrs. Kunelius?  
17 MS. FETOUH: Objection.  
18 MS. ECKER: Objection.  
19 A Well, there is a contract that we've spent a lot of  
20 time talking about that TPL became the assignee of.  
21 So, in effect, yes, that contract is the contract  
22 we're talking about.  
23 Q Looking at the very last sentence of this exhibit, it  
24 states: If so, we ask that you authorize your

- 244 -

1 chairman to sign below as an indication of your  
2 partnership with TPL. Do you see that?  
3 A I do.  
4 Q Now, you have alleged, or you have denied, the  
5 existence of any partnership between yourself and the  
6 Town of Stow, is that correct?  
7 A Yes.  
8 Q Not yourself but TPL. Is that correct?  
9 A It's my understanding that TPL has denied the  
10 existence of a partnership and that, individually, I  
11 have denied that TPL and the town had a partnership.  
12 Q And you continue to deny that notwithstanding the fact  
13 that there is a written document that evidences their  
14 indication of joining the partnership and that there's  
15 a written document indicating what the cost of joining  
16 the partnership would be.  
17 MR. CONROY: Objection.  
18 MS. FETOUH: Objection.  
19 MS. ECKER: Objection.  
20 Q That means the Town of Stow.  
21 MS. FETOUH: Objection.  
22 MS. ECKER: Objection.  
23 Q Is that fair to say? Well, go head.  
24 A Do you want to keep asking something?

- 245 -



## DEPOSITION OF CRAIG MACDONNELL

MINIDEP by Kenson

1 Q No, go head. Is that fair to say?  
 2 A It is fair to say that the partnership we're referring  
 3 to in Exhibit 23 is not a legal partnership but just a  
 4 colloquial level of cooperation that doesn't rise to  
 5 the level of a legal partnership.  
 6 Q Now, do you think a legal partnership has to be in  
 7 writing, sir?  
 8 MS. FETOUH: Objection.  
 9 MR. CONROY: Objection.  
 10 A I don't have thoughts about that.  
 11 Q Well, you're aware that two people can have a joint  
 12 venture which is called a general partnership in which  
 13 they both work for some single purpose, such as two  
 14 lawyers joining together for a law firm. There's no  
 15 requirement of a written document in that instance, is  
 16 there?  
 17 MS. FETOUH: Objection.  
 18 MR. CONROY: Objection.  
 19 A I don't know that to be true. My understanding is  
 20 that the relationship that TPL had with the Town of  
 21 Stow is not that kind of partnership.  
 22 Q How many kinds of partnerships are there that you're  
 23 aware of?  
 24 MS. FETOUH: Objection.  
 - 246 -

1 MR. CONROY: Objection.  
 2 A Well, there is this kind, this informal collaboration,  
 3 lower case P, non-legal, and then there are legal  
 4 partnerships, sort of the formal partnership that the  
 5 law firms that I was a part of and you may have been a  
 6 part of, and that these folks are part of, that  
 7 constitute a partnership.  
 8 Q Have you ever heard of the concept of partnership  
 9 estoppel?  
 10 A No.  
 11 MR. McLAUGHLIN: Almost done. I think  
 12 we're there.  
 13 Q I want you to just look at Exhibit 8 for a moment.  
 14 Exhibit 8 is the Stow Community Preservation Committee  
 15 minutes of February 10th. On the third page, which is  
 16 040, now, this is on February 10th, third paragraph  
 17 down: A committee member asked Bob Wilbur about his  
 18 conversation with Marilyn Kunelius. Bob said that she  
 19 is afraid the contract may unravel with the town  
 20 intervention and she will lose everything. Bob said  
 21 TPL will not back down from a commitment.  
 22 Now, you were present at that meeting, so  
 23 isn't it fair to say that you were aware that  
 24 Mrs. Kunelius was afraid that she would lose  
 - 247 -

1 everything as a result of the intervention of the  
 2 town and subsequent transfer of the right to TPL?  
 3 MR. CONROY: Objection.  
 4 A My memory of Mrs. Kunelius' situation is that this was  
 5 an important asset for her. I don't have a  
 6 recollection of this item being discussed at this  
 7 meeting.  
 8 Q It goes on to say: Tom Marr spoke from the audience  
 9 and said, "This is not the babe we want to fool around  
 10 with and 1.2 is not the figure." Do you know what  
 11 that's about, and do you know who he's talking about?  
 12 Is Mrs. Kunelius the babe they were talking about?  
 13 A I can honestly say I have no idea what that refers to.  
 14 Q You can honestly say you have no idea. Was there some  
 15 other individual that was a babe that had a connection  
 16 with the 1.2 million dollar number?  
 17 MS. FETOUH: Objection.  
 18 MR. CONROY: Objection.  
 19 A I don't know what this is about.  
 20 MR. McLAUGHLIN: Okay. I think that's  
 21 it. Thank you.  
 22 (WHEREUPON, the deposition concluded at  
 23 5:52 P.M.)  
 24  
 - 248 -

CERTIFICATE  
 COMMONWEALTH OF MASSACHUSETTS  
 COUNTY OF ESSEX, ss.

I, Roberta J. Daniels, a Court Reporter and  
 Notary Public within and for the Commonwealth of  
 Massachusetts, do hereby certify that the foregoing  
 deposition of CRAIG MacDONNELL was taken before me on  
 February 8, 2007, that the said witness was  
 satisfactorily identified and duly sworn before the  
 commencement of his testimony and that the testimony  
 was taken audiographically by myself and then  
 transcribed by myself. To the best of my knowledge,  
 skill and ability, the within transcript is a complete,  
 true and accurate record of said deposition.

Further, I am not connected either by blood  
 or by marriage with any of the said parties nor am I  
 interested either directly or indirectly in the matter  
 in controversy.

IN WITNESS WHEREOF, I have hereunto set my  
 hand and affixed my notarial seal this 20th day of  
 February, 2007.

Roberta J. Daniels, Notary Public  
 Commission expires: 11-15-13  
 - 249 -

CERTIFICATE  
 I, CRAIG MacDONNELL, do hereby certify that I  
 have read the foregoing transcript of my testimony and  
 further certify that said transcript is a true,  
 accurate and complete record of said testimony.  
 Dated at , this  
 day of , 2007,  
 under the pains and penalties of perjury.

- 250 -

ERRATA SHEET  
 Deposition of CRAIG MacDONNELL

Page Line  
 No. No. Transcript reads Change made

- 251 -

## DEPOSITION OF CRAIG MACDONNELL

MINDEX by Kenson

| Word . . . . . Page             | Word . . . . . Page           | Word . . . . . Page             | Word . . . . . Page             | Word . . . . . Page            |
|---------------------------------|-------------------------------|---------------------------------|---------------------------------|--------------------------------|
| .93 ... 150                     | 18 ... 181, 193               | 192-196, 225                    | abusing ... 175                 | advantage ... 96, 98, 123      |
| \$1,116,000 ... 223             | 19 ... 209, 210, 218          | 411 ... 105                     | abutter ... 190                 | adverse ... 230                |
| \$1,116,900 ... 195, 224        | 1983 ... 10                   | 42.1 ... 157                    | accept ... 47, 48, 50, 57, 68,  | advice ... 159, 209, 211, 212  |
| \$100,000 ... 54                | 1999 ... 35                   | 443 ... 219                     | 84, 135, 156, 236               | advise ... 236                 |
| \$19,000 ... 218                | 2 ... 17, 36, 82, 84, 136,    | 45 ... 96, 129                  | acceptable ... 63, 92           | Advisor ... 120                |
| \$2,333 ... 220                 | 155, 172, 173, 220,           | 456,000 ... 221                 | acceptance ... 45-48, 56-58,    | Advisors ... 108, 197,         |
| \$22,000 ... 156, 208, 217,     | 237, 248                      | 46 ... 196, 201                 | 60, 61, 68, 72, 168,            | 201-203, 206                   |
| 218                             | 2:20 ... 136                  | 476 ... 45                      | 207                             | advocating ... 70              |
| \$300,000 ... 237               | 2:31 ... 136                  | 478 ... 45                      | accepted ... 49, 57, 70, 73,    | affect ... 9                   |
| \$350,000 ... 104, 212          | 20 ... 87, 88, 101, 103, 136, | 5 ... 45-47, 49, 176, 234,      | 86, 99, 119, 140, 144,          | afford ... 202                 |
| \$400,000 ... 55, 56, 67-70,    | 156, 181, 212                 | 238, 248                        | 145, 147, 168                   | affordability ... 94, 95       |
| 93, 94, 98, 132, 135,           | 20,000 ... 156                | 5:24 ... 234                    | accepting ... 43, 48, 55, 97,   | affordable ... 54, 100, 137    |
| 136, 145, 220, 222,             | 2000 ... 19                   | 5:29 ... 234                    | 158, 170, 200                   | afore ... 145                  |
| 223                             | 2001 ... 124                  | 5:52 ... 248                    | accesses ... 167                | afraid ... 218, 247            |
| \$500,000 ... 95, 96, 237       | 2002 ... 7, 26, 28, 36, 40,   | 50 ... 82, 83, 193, 223, 224    | accessing ... 126               | against ... 52, 80, 155, 192,  |
| \$56,000 ... 221                | 42                            | 501c3 ... 7, 14, 21, 208        | accompanied ... 198             | 197, 201, 203, 227             |
| \$6,000,000 ... 110, 125        | 2003 ... 8, 14, 24, 35-37,    | 531 ... 59                      | accomplish ... 38, 44, 72       | agencies ... 76, 117           |
| \$700,000 ... 96                | 39, 42, 44-47, 49, 56,        | 5th ... 241-243                 | accordance ... 72, 180          | agency ... 117                 |
| \$800,000 ... 84, 94, 95, 226,  | 57, 64, 79, 81, 84,           | 6 ... 49, 50, 54-57, 59, 60,    | according ... 97, 187           | agitated ... 198               |
| 232, 236-238                    | 121, 137, 138,                | 67, 68, 73-75, 110,             | account ... 115, 230, 231       | agree ... 50, 132, 153-155,    |
| \$900,000 ... 199               | 165-167, 178, 191, ...        | 121, 125, 134, 162,             | accounted ... 94, 95            | 157, 172, 178, 181,            |
| 03 ... 106                      | 206, 209, 210, 212,           | 164, 166, 167, 212,             | accounts ... 209, 231, 233      | 186, 218, 223-225              |
| 039 ... 64                      | 213, 227, 228, 238            | 213, 219, 234...                | accrued ... 181                 | agreed ... 95, 152, 182, 195   |
| 040 ... 247                     | 2004 ... 35, 193, 196, 234    | 6,000,000 ... 110, 125          | accuracy ... 66                 | agreement ... 93, 94, 96, 97,  |
| 1 ... 16, 82, 84, 92, 94, 113,  | 2005 ... 75                   | 61 ... 27, 37, 60, 62, 63, 70,  | accurate ... 65, 66, 86, 110,   | 113, 119, 128, 132,            |
| 157, 172, 186, 195,             | 2007 ... 6                    | 73, 89, 97, 140, 148,           | 208, 222                        | 136, 140, 144, 148,            |
| 197, 223, 224, 243,             | 21 ... 183, 227, 228          | 154, 158, 161, 162,             | achieve ... 74, 81, 85, 141,    | 149, 151, 164, 169,            |
| 248                             | 216 ... 35                    | 173                             | 187, 190                        | 172, 177, ... 183, 186,        |
| 1.116 ... 94, 186               | 22 ... 156, 208, 217, 218,    | 617 ... 107                     | achieved ... 74                 | 194, 200, 218,                 |
| 1.2 ... 82, 84, 248             | 234                           | 61A ... 37, 41-43, 58, 63,      | achieving ... 170               | 221-224, 242                   |
| 1.2 ... 84                      | 23 ... 75, 183, 238, 246      | 185                             | acknowledged ... 87             | agreements ... 157             |
| 1,116,900 ... 195, 224, 243     | 24 ... 183, 197, 220, 234     | 61B ... 192                     | acknowledges ... 183            | ahead ... 29, 52, 53, 96, 98,  |
| 1:16 ... 92                     | 25 ... 24, 183, 228, 242      | 6200 ... 107                    | acquainted ... 21               | 129, 133, 174-176,             |
| 10 ... 6, 64, 79, 81, 163       | 25th ... 228                  | 63 ... 122                      | acquire ... 76, 78, 87, 119,    | 182, 188                       |
| 10:01 ... 6                     | 26 ... 121, 178, 184          | 64 ... 123, 150                 | 135, 139, 210                   | air ... 205                    |
| 100,000 ... 54, 226             | 3 ... 18, 19, 47, 75, 106,    | 6A ... 219                      | acquired ... 90, 91, 143        | alive ... 199                  |
| 10th ... 65, 66, 247            | 121, 163, 172, 173            | 6C ... 220, 221                 | acquiring ... 33, 34, 36, 39    | allegation ... 241             |
| 11 ... 49, 56, 59, 60, 105,     | 3:10 ... 163                  | 6th ... 212                     | acquisition ... 19, 76, 83, 87, | allegations ... 88, 101        |
| 121, 122, 138, 191,             | 3:17 ... 163                  | 7 ... 51, 79, 81, 84, 150,      | 126, 164, 243                   | alleged ... 140, 241, 245      |
| 234                             | 30 ... 24, 59, 91, 106, 121,  | 154-156, 177                    | acquisitions ... 8              | allocation ... 223, 224        |
| 11:30 ... 59                    | 134, 145, 150-153,            | 7.64 ... 150                    | acre ... 6, 22, 23, 35, 37, 68, | allow ... 54, 61, 103, 128,    |
| 11:44 ... 60                    | 157, 162, 164, 177            | 7:15 ... 81                     | 80, 81, 109, 145, 146,          | 130, 151, 153, 163,            |
| 11th ... 49, 54, 56, 57, 61,    | 300 ... 54, 85, 226, 237      | 700 ... 85, 95, 96              | 150, 151, 157, 165,             | 173                            |
| 74, 191, 192                    | 300,000 ... 54, 85, 237       | 700,000 ... 85, 95, 96          | 187, 190, 192, 193,             | allowed ... 153                |
| 12 ... 45-47, 56, 59, 91, 92,   | 31 ... 136, 181, 182, 232     | 71 ... 123, 125                 | 212-214, ... 216-219,           | alter ... 151, 173             |
| 124, 157, 180, 222              | 32 ... 157                    | 7th ... 84                      | 223-225                         | alteration ... 167             |
| 12:30 ... 59, 91                | 325 ... 100, 104              | 8 ... 6, 64, 66, 145, 146,      | acres ... 96, 129, 186, 223,    | alternative ... 31, 199-201    |
| 12:34 ... 92                    | 33 ... 18                     | 150-152, 157, 178,              | 224                             | Alternatively ... 52, 155      |
| 125,000 ... 100                 | 337 ... 106                   | 186, 223-225, 247               | Action ... 17-19, 197, 201      | ambiguity ... 166              |
| 12th ... 45-47, 49, 54, 57      | 342 ... 107, 111              | 8.57 ... 145, 146, 150-152,     | actions ... 170                 | among ... 43, 134              |
| 13 ... 36, 37, 42, 137, 180,    | 343 ... 111                   | 157, 178, 186, 223-225          | actively ... 43                 | amount ... 8, 54, 56, 80, 83,  |
| 222, 225                        | 35 ... 157, 186, 187          | 80 ... 157, 183                 | activities ... 189, 209         | 84, 91, 93, 100, 109,          |
| 13th ... 36, 39, 40             | 350 ... 100, 104, 138, 212    | 800 ... 6, 84, 94, 95, 226,     | actual ... 44, 129, 133, 204    | 110, 125, 127, 151,            |
| 14 ... 154, 155, 197, 219,      | 350,000 ... 104, 138, 212     | 232, 236-238                    | add ... 94, 95, 162, 167        | 177, 200, 216, 218,            |
| 220                             | 351 ... 122                   | 9 ... 75, 137, 227              | adding ... 221                  | 219, 222, ... 223, 225,        |
| 140 ... 118                     | 367 ... 107                   | 90 ... 167                      | addition ... 118, 167           | 226, 228                       |
| 142 ... 22, 23, 55, 68, 84, 85, | 4 ... 35, 95, 96, 124, 172,   | 91 ... 87                       | address ... 6, 18, 210          | amounts ... 181, 231           |
| 122, 142, 143, 146,             | 173, 176, 197                 | 95 ... 37                       | addressed ... 157               | analyses ... 235               |
| 151, 170, 229, 237              | 4,000 ... 124                 | 9th ... 137, 222, 225           | addresses ... 126               | analysis ... 73, 98, 139, 168, |
| 144 ... 55, 68, 84, 85, 118,    | 4:14 ... 197                  | A                               | addressing ... 128              | 169, 185, 189, 229,            |
| 122, 142, 143, 146,             | 4:24 ... 197                  | A.M. ... 6, 59, 60              | adequate ... 70, 167            | 235                            |
| 151, 170, 229, 237              | 40 ... 124                    | abide ... 59, 60                | adjacent ... 25, 31, 187, 190   | analyze ... 29, 244            |
| 15 ... 81, 164, 165, 193, 210   | 400,000 ... 55, 56, 67-70,    | ability ... 128, 134, 143, 187, | adjustments ... 181             | analyzes ... 29, 139           |
| 154 ... 193                     | 85, 93, 94, 96, 98,           | 217, 234                        | administrator ... 107, 210      | Anger ... 216                  |
| 15th ... 210, 211               | 132, 135, 136, 145,           | able ... 70, 71, 141, 187,      | admit ... 107                   | angry ... 198, 215, 217        |
| 16 ... 92, 166, 181             | 220, 222, 223, 226            | 203, 209, 236                   | admits ... 88, 101              | animated ... 205               |
| 17 ... 83, 124, 163, 181, 191,  | 40B ... 25, 31, 64, 145,      | above ... 110, 111, 122, 138    | admitted ... 88, 101            | annual ... 35                  |
| 209                             | 157, 178, 179, 182,           | absence ... 70, 142, 191        | advance ... 44                  | ANR ... 166, 167               |
| 17.50 ... 83                    | 184, 186, 189,                | absolute ... 69, 210            | advanced ... 13                 | anticipate ... 85, 141         |

**DEPOSITION OF CRAIG MACDONNELL****MINDEX by Kenson**

| Word . . . . . Page  | Word . . . . . Page  | Word . . . . . Page   | Word . . . . . Page  | Word . . . . . Page   |
|--|--|---|--|---|
| anticipated ... 64, 135, 140, 141, 171, 172, 233   | assignee ... 39, 59, 62-64, 140, 151, 154, 158, 171, 176, 181, 185, 244  | babe ... 248  | bond ... 52, 155   | 134, 135, 139, 143, 146, 150, 160-163, 165-167, ... 175, 192, 203, 206, 226, 228, 246, 248                            |
| anticipates ... 179  | assigning ... 45, 207  | back ... 20, 24, 28, 52, 54, 57, 66, 67, 91, 93-95, 100, 121, 125, 133-135, 150, 161, 164, 170, 187-189, ... 194, 200, 201, 206, 219, 235, 239, 247 | bono ... 124, 201-203, 209   | cap ... 75  |
| anyhow ... 67, 69  | assignment ... 37-50, 55, 57, 59, 65-68, 70, 72-74, 84, 86, 87, 97-99, 119, 140, 144, 145, 151, 155, ... 156, 164, 168, 170, 210, 223, 244 | background ... 10   | bonuses ... 15   | capacity ... 76, 117, 163, 203, 204   |
| anymore ... 123, 191, 200  | assists ... 158  | backs ... 51, 155   | Boothroyd ... 197, 198, 207  | capital ... 76, 77, 110, 111, 122, 138, 140, 142, 215, 216, 218, 227, 237   |
| anywhere ... 56, 152   | assist ... 29, 36, 45  | backup ... 206, 227   | borrow ... 77, 79, 113, 127, 142, 184, 187, 188, 215   | caps ... 57   |
| apologize ... 31, 37, 76, 165  | assistance ... 211   | balance ... 231   | borrower ... 135, 136  | capture ... 118   |
| appalled ... 174   | assisted ... 198   | ball ... 43   | borrowing ... 114, 118, 127, 128, 131, 132, 139, 142, 188, 222, 227  | care ... 87, 141  |
| apparent ... 75, 143, 153, 216, 229  | associate ... 11   | Bank ... 107-110, 114, 115, 118, 120, 127, 188, 206, 233, 234   | Boston ... 7, 10, 18, 24, 126  | career ... 10   |
| apparently ... 192, 210, 212, 233  | associated ... 78  | banking ... 120   | Both ... 47, 56, 64, 87, 89, 92, 181, 246  | careers ... 69  |
| Appeals ... 228  | associates ... 124   | banks ... 127   | bothering ... 165  | careful ... 164   |
| appear ... 143, 157, 191   | assumption ... 87, 129, 135, 145   | bar ... 33, 174   | bottom ... 106, 107, 119, 177, 236, 241  | carefully ... 233   |
| appeared ... 139, 188  | assurance ... 239  | bargain ... 147   | bound ... 58, 60, 73   | caring ... 88, 101  |
| appears ... 15, 39, 51, 81, 105, 106, 154, 155, 167, 181, 184, 210, 211, 228                   | assured ... 239  | Barlow ... 201, 202   | boundary ... 151   | Carol ... 193   |
| applicable ... 58-60, 73, 97, 148, 158, 176, 178, 185, 224, 226                                | asterisk ... 177, 180  | barn ... 196  | branch ... 115, 176  | carry ... 231   |
| application ... 99, 100, 104-106, 108, 109, 117, 122, 123, 143, 186, 212, 228                  | attach ... 235   | based ... 62, 63, 83, 123, 175-178, 180, 183, 184, 227, 229   | break ... 59, 136, 163, 191, 197, 234  | case ... 30, 32, 38, 41, 72, 113, 116, 122, 158, 161, 162, 183, 188, 201-204, 207, 226, 247                           |
| applications ... 116, 117, 120   | attached ... 94, 110, 227, 234   | basic ... 148, 151, 196   | bridge ... 76-78, 217, 222, 223, 226   | cases ... 89, 158, 159  |
| applied ... 115, 159, 229  | attachments ... 45, 234  | basis ... 62, 103, 227, 232, 244  | bridging ... 78, 226   | cash ... 94, 230-233, 238   |
| applies ... 161, 162, 183  | attempting ... 116   | Bate ... 35, 105, 193, 219  | Brief ... 52, 205  | catastrophic ... 138  |
| apply ... 58-60, 62, 63, 72, 149, 154, 156, 157, 159-161, 163, 172, 176, 178-180, 183-185, 229 | attended ... 28, 30, 36, 66, 191, 204  | bear ... 82   | brings ... 153   | category ... 167  |
| applying ... 104, 158, 179, 189, 228   | attending ... 27, 28, 65, 197  | became ... 21, 75, 119, 143, 153, 189, 216, 228, 229, 244   | broker ... 197   | cause ... 9   |
| approach ... 107   | attention ... 34, 107, 113, 177  | become ... 19, 110, 123, 137, 198, 241  | brokerage ... 181  | caused ... 150, 218   |
| approached ... 213   | attorney ... 10, 16, 20, 62, 63, 86-88, 92, 100, 101, 123, 140, 149, 158, 164, 172, 203, 207, 208, 240...                                  | becomes ... 39, 76, 104, 152  | brought ... 34, 197, 201   | cc ... 46   |
| appropriate ... 91, 152, 156, 162, 164, 166, 169   | attorneys ... 149  | began ... 30, 43  | budget ... 76, 232, 233  | certain ... 80, 97, 102, 120, 130, 132, 161, 163, 218, 239  |
| approval ... 110, 111, 113, 126, 157, 166, 167, 179, 182                                       | audience ... 248   | begins ... 81, 233  | budgeting ... 233  | certainly ... 43, 89, 121, 125, 152, 161, 193, 225, 240   |
| approvals ... 168  | August ... 121   | behavior ... 174  | build ... 184  | certainty ... 81, 88, 89, 158, 195  |
| approve ... 67, 222  | author ... 155   | belabor ... 74  | building ... 18, 81  | certificates ... 231  |
| approved ... 166, 170, 222, 223, 226, 236  | authored ... 235   | belief ... 89   | buildings ... 173  | chairman ... 228, 245   |
| approximately ... 11, 25, 26, 42, 44, 84, 85, 93-95, 226, 230                                  | authorities ... 8  | believed ... 60, 61, 72, 89, 90, 137, 152, 156, 158, 203, 213, 219, 224   | built ... 25, 170, 235   | challenging ... 168   |
| April ... 121, 193, 209-211  | authority ... 8, 9, 28, 47, 48   | believes ... 131, 151, 157, 189   | burden ... 129   | chance ... 207  |
| aquifer ... 191  | authorize ... 48, 68, 244  | believing ... 75  | buy ... 67, 69, 70, 83, 103, 123, 139  | change ... 10, 27, 29, 62, 152, 167, 200, 223   |
| area ... 14, 167, 191  | authorized ... 48  | bell ... 108  | buyer ... 58, 60, 78, 79, 119, 150, 153, 154, 156, 157, 172, 179, 183, 207   | changed ... 28, 69, 153, 222  |
| argument ... 146, 153, 160, 200  | authorizes ... 37  | below ... 107, 147, 245   | business ... 69, 75, 116, 179, 239   | changes ... 169   |
| arise ... 158, 159   | avail ... 96, 220  | benefit ... 209, 235  | buying ... 76  | changing ... 104  |
| arms ... 205   | availability ... 29, 99, 128, 152, 215, 221  | benefits ... 147  | bylaw ... 167  | Chapter ... 27, 37, 41-43, 58, 60, 62, 63, 73, 89, 97, 140, 148, 154, 158, 161, 162, 178, 179, 185, 192, ... 194, 196 |
| arose ... 229  | available ... 75, 76, 96, 98, 99, 102, 103, 108, 110, 111, 115, 118, 127, 128, 139, 143, 152, 175, 184, ... 195, 221, 231, 232, 243        | beside ... 15   | C  | characterization ... 228  |
| article ... 67   | availed ... 184  | Bickford ... 12   | Cafeteria ... 59   | characterize ... 226  |
| articulate ... 205   | Availing ... 127   | big ... 9   | California ... 126, 208  | charge ... 7, 203   |
| assemble ... 61, 235   | aware ... 14, 19, 57, 104, 108, 110-112, 116, 118-120, 124-126, 137, 152, 161, 189, 192-194, 206, ... 207, 241, 246, 247                   | bind ... 8  | call ... 13, 20, 24, 207   | charitable ... 14, 186, 207, 208  |
| assembled ... 90, 94   | assessment ... 30  | blank ... 110   | called ... 22, 64, 119, 218, 246   | chart ... 109   |
| assessment ... 30  | asset ... 87, 248  | BNC ... 106   | calling ... 24   | check ... 86, 194   |
| asset ... 87, 248  | assets ... 71, 203, 227, 231, 232, 238   | Board ... 28, 41, 42, 44-48, 52-54, 81, 82, 108, 110, 113, 120, 165, 167, 168, 191-193, 197, 201-203, ... 206, 210, 212, 222, 228, 241              | calls ... 149  | checked ... 14  |
| assets ... 71, 203, 227, 231, 232, 238   | assign ... 37, 46, 47, 49, 192   | boards ... 168, 211   | calm ... 204   | checking ... 230, 231, 233  |
| assigned ... 156, 157, 177, 183, 193, 207, 216   | assigned ... 156, 157, 177, 183, 193, 207, 216   | Bob ... 198, 204-206, 247   | campaign ... 117   | Choate ... 202  |
|  |  | body ... 44   | Can ... 6, 10, 15, 16, 18, 20, 21, 23, 31, 35, 37, 40, 42, 44, 50, 52, 59, 62, 63, 70, 76-79, 91, 101-103, ... 107, 113, 114, 125, 128, 130, | chose ... 14  |
|  | <b>B</b>   | bold ... 154, 155, 178, 220   |  | Chris ... 105   |

## DEPOSITION OF CRAIG MACDONNELL

MINDEX by Kenson

| Word ..... Page  | Word ..... Page  | Word ..... Page   | Word ..... Page   | Word ..... Page   |
|--|--|---|---|---|
| Christopher ... 116  | 196, 198, 227, 234, 240, 241   | consequences ... 156  | Cook ... 18   | 178, 198, 199   |
| chunk ... 205  | complete ... 54, 69, 70, 95, 113, 128, 139, 142, 153, 188, 192   | conservation ... 7, 18, 19, 22-26, 29-31, 33, 34, 37, 38, 42, 77, 81, 139, 141, 142, 158, 178, 187, 191-193, ... 205, 212, 233, 236, 243                                      | cooperate ... 157   | dated ... 45-47, 49, 68, 137, 166, 167, 209, 212, 228, 234, 238                               |
| circumstance ... 102, 120, 126   | completed ... 52, 139, 142, 155  | conserv ... 25, 69  | cooperation ... 246   | dates ... 44, 50  |
| circumstances ... 22, 23, 57, 62, 100, 104, 118, 126   | completely ... 61, 141, 223  | conserved ... 193   | copied ... 46, 167  | David ... 81, 92, 197   |
| city ... 143   | completeness ... 111   | conserving ... 193  | copies ... 51   | dawned ... 78   |
| civil ... 117  | compliance ... 167   | consider ... 25, 70, 71, 78, 149, 150, 185, 226, 231, 232, 243  | copy ... 106  | dawning ... 78  |
| claim ... 71, 209  | complicated ... 144  | consideration ... 148, 167  | Cornell ... 12, 13, 240   | day ... 47, 49, 50, 61, 194, 204, 212, 239  |
| clarify ... 16, 42, 48, 60, 81, 91, 121, 122, 133, 221   | complicating ... 169   | considered ... 48, 70, 95, 97, 157, 172, 188, 231   | Corner ... 6  | days ... 65, 66   |
| clause ... 71-75, 119, 149, 158, 183, 207  | comply ... 60, 63, 97, 152, 154, 176, 179, 187   | considering ... 78, 83, 86, 151, 233  | corrected ... 110   | dead ... 200, 201   |
| close ... 75, 94, 110, 127   | complying ... 98, 132  | consistent ... 83   | correctness ... 203   | deal ... 51, 72, 78, 130, 134, 144, 148, 155, 172, 181, 192, 199, 213, 224-226, 228, 237, 243 |
| closely ... 231  | component ... 57, 94, 147, 161, 225  | consisting ... 150  | correspondence ... 155, 158, 206  | dealing ... 36, 71, 189, 207  |
| closing ... 52, 91, 94, 96, 121, 143, 155, 181, 182, 221   | components ... 97  | constellation ... 29  | cost ... 82, 117, 118, 192, 202, 245  | deals ... 18, 89, 185   |
| Co ... 92, 157, 169, 172, 182, 184, 186, 189, 193-195, 223, 224, 230, 244                                  | concentration ... 210  | constitute ... 247  | costs ... 83, 85, 157   | dealt ... 147   |
| Cobb ... 81  | concept ... 89, 247  | construction ... 157, 183-186   | cottage ... 167   | debate ... 217  |
| code ... 59  | concern ... 62, 160  | consultant ... 104, 105   | counsel ... 45, 46, 52, 87, 92, 99, 110, 112, 125, 126, 130, 132, 145, 149, 159-161, 196, 197, 201-203, ... 207, 209, 228 | debated ... 203   |
| collaboration ... 247  | concerned ... 31, 207, 218, 227  | contact ... 21, 23, 24, 26, 31-33, 36, 41, 122  | count ... 24, 209, 211  | December ... 28, 40, 232  |
| collateral ... 233   | concerning ... 21, 24-28, 33, 34, 36, 39-41, 47, 58, 66, 89, 99, 130, 147, 165, 191, 195, 212, 213, 215, ... 217, 219, 240   | contacted ... 21-25, 27, 30, 32, 36, 37, 41   | counting ... 237  | decide ... 152, 156, 159  |
| collection ... 195, 216  | conclude ... 98, 129, 142  | contacting ... 26, 32   | couple ... 36, 81, 107  | decided ... 91, 113, 114, 144, 157, 158, 188, 213, 218  |
| colloquial ... 242, 246  | concluded ... 75, 96, 97, 248  | contain ... 116   | course ... 43, 90, 171, 173, 185, 214, 240  | decision ... 68, 96, 97, 114, 121, 161, 221, 228, 230   |
| combination ... 54, 241  | conclusion ... 139, 149, 150   | contained ... 131, 145, 153   | courses ... 13  | decisions ... 58, 72  |
| come ... 25, 26, 71, 95, 96, 98, 134, 137, 139, 171, 188, 189, 200, 206, 215, 237-239                      | conclusions ... 148  | contemplate ... 70, 186   | court ... 86, 112, 118, 119, 127, 160, 161, 174, 185  | declare ... 242   |
| comes ... 126, 174, 233  | Concord ... 6  | contemplated ... 186, 221, 235, 237   | cover ... 106, 117, 118   | deduction ... 209   |
| coming ... 52, 140, 162, 189, 190, 233, 237  | condition ... 57, 173, 196   | contemplates ... 186  | CPA ... 117   | deductions ... 209  |
| comment ... 66   | Conditions ... 51, 119, 154  | contemplating ... 244   | CPC ... 42, 64, 65, 236   | deeds ... 55, 73  |
| commenting ... 197   | conducted ... 185  | context ... 113, 152, 196   | Craig ... 6, 37, 49, 81, 106, 107, 113, 119, 121, 129, 135, 162, 163, 165, 193, 210                                       | deem ... 152  |
| comments ... 28  | confidence ... 89, 228, 234  | contingencies ... 194   | create ... 153, 167   | default ... 114, 115, 120, 156, 171, 197, 201   |
| Commission ... 33, 42, 68, 193   | confidences ... 164  | contingency ... 72, 108, 117, 169, 183, 186, 194  | created ... 229   | defaulted ... 156   |
| commissioner ... 12  | confident ... 89   | contingent ... 107, 239   | creation ... 31, 76   | defeated ... 189  |
| commitment ... 67, 247   | configuration ... 146, 151   | continue ... 175, 197, 236, 245   | credit ... 77, 107-111, 113-116, 118-120, 125-128, 138, 175, 187, 188, 206, 215-218, 227, 231, 233, ... 234, 237          | defect ... 180  |
| commitments ... 244  | confirmation ... 118   | continued ... 236   | criminal ... 117  | defects ... 180   |
| Committee ... 48, 64, 65, 79, 81, 247  | conforming ... 167   | continuing ... 105, 199   | critical ... 68, 76, 87, 143  | defend ... 52, 155, 175, 197, 201   |
| committees ... 42  | conformity ... 167   | contract ... 9, 39, 58-66, 71, 73, 80, 91, 93, 98, 99, 123, 128, 136, 140-142, 144, 145, 148, 152, 153, ... 156, 158, 169-173, 177-179, 182-185, 187, 194, 200, 201, 244, 247 | crunches ... 104  | Defendants ... 113, 119, 121  |
| common ... 58, 104, 156, 185, 229  | confuse ... 107  | contracts ... 8   | crux ... 188  | defended ... 163  |
| Commons ... 27, 28, 93-95, 129, 134, 136, 140, 144, 148, 170-172, 179, 184, 189-191, 207, 223-225, ... 230 | confused ... 74  | contractual ... 242-244   | currently ... 112   | deferred ... 162  |
| Commonwealth ... 12, 15, 100, 116, 117, 122, 123, 142, 187   | confusing ... 168  | contributing ... 94   | customary ... 110   | define ... 8  |
| communicate ... 220  | conjunction ... 117  | contribution ... 122, 186   | cut ... 166   | defined ... 151   |
| communications ... 160   | connection ... 15, 197, 248  | control ... 174, 187, 210   |   | definition ... 77   |
| communities ... 19, 81   | connections ... 197, 201   | conventional ... 184  |   | degree ... 13, 167  |
| Community ... 64, 65, 68, 100, 104, 138, 192, 243, 247   | CONROY ... 6, 8, 14, 16, 17, 19-21, 29, 31-34, 36-41, 43, 49, 50, 52, 53, 55, 57-59, 61-63, 65, 68, ... 70, 72-77, 79, 80, 82, 86, 88-91, 93, 101, 102, 109-112, 114-116, 121, 123, 125-130, ... 132-136, 139-156, 158, 159, 162, 164, 168, 170-177, 183, 184, 187, 189, 191, ... 195-197, 205, 207-212, 214, 216, 218, 220, 223, 224, 226, 238, 239, 242, 245-248 | conversation ... 31, 89, 100-102, 131, 133, 209, 247  |   | degrees ... 13  |
| company ... 27   |  | conversations ... 32, 35, 40, 44, 165, 189, 214, 215  |   | delicate ... 191  |
| comparable ... 240   |  | conversion ... 100  |   | deliver ... 91, 176, 221  |
| compelled ... 64   |  | convey ... 60, 83, 186  |   | demand ... 197  |
| compilation ... 45, 105, 177, 193  |  | conveying ... 129   |   | demonstrated ... 192  |
| complaint ... 85-88, 101,  |  | convince ... 209  |   | denied ... 241, 245   |
|  |  | convincing ... 43   |   | denies ... 88, 101  |
|  |  |   |   | Denise ... 123, 125, 228  |
|  |  |   |   | deny ... 89, 245  |
|  |  |   |   | denying ... 202   |
|  |  |   |   | Department ... 11, 12, 100, 104, 138  |
|  |  |   |   | dependent ... 91  |
|  |  |   |   | depose ... 162  |
|  |  |   |   | deposes ... 6   |
|  |  |   |   | deposit ... 177, 181, 182, 231  |
|  |  |   |   | deposited ... 80, 81  |
|  |  |   |   | deposition ... 6, 16, 17, 32, 63, 134, 162, 164, 174,   |



## DEPOSITION OF CRAIG MACDONNELL

MINDEX by Kenson

| Word . . . . . Page            | Word . . . . . Page             | Word . . . . . Page            | Word . . . . . Page            | Word . . . . . Page              |
|--------------------------------|---------------------------------|--------------------------------|--------------------------------|----------------------------------|
| 175, 211, 248                  | dissatisfied ... 215            | 158, 159, 168, 172,            | 148, 153, 159, 219,            | faced ... 188                    |
| deposits ... 80, 113, 181, 219 | dissuade ... 189                | 174, 183, 184, ... 187,        | 227                            | facile ... 212                   |
| derived ... 15, 56, 147        | dissuaded ... 189               | 189, 194, 195, 204,            | establish ... 186, 244         | facilitate ... 100, 151          |
| describe ... 14, 77, 98, 165,  | distinct ... 215                | 207, 209, 214, 220,            | established ... 23, 57         | factors ... 29                   |
| 209                            | distinguish ... 34              | 223, 224, 226, 244,            | establishing ... 50, 212, 233  | fail ... 111, 140, 141           |
| described ... 42, 108, 145,    | division ... 18, 19, 230        | 245                            | establishment ... 24           | failed ... 72-74, 104, 113,      |
| 150, 181, 182, 216             | doctrine ... 229                | economy ... 138                | estate ... 76, 182, 197        | 141, 180                         |
| describing ... 210             | document ... 15-18, 35, 48,     | education ... 13               | estimation ... 9               | failing ... 170                  |
| description ... 217, 236       | 49, 51, 57, 64, 66, 75,         | educational ... 10             | estoppel ... 247               | failings ... 110                 |
| design ... 83                  | 81, 105, 111, 119,              | effect ... 50, 78, 97, 189,    | ethical ... 175                | failure ... 52, 138, 155, 170    |
| designate ... 209              | 125, 130, 131, 136,             | 192, 193, 195, 201,            | events ... 44, 166             | fair ... 26, 27, 43, 49, 50, 62, |
| designation ... 14, 15, 20,    | 154, 155, ... 165,              | 203, 207, 230, 244             | eventually ... 140, 226        | 64, 67, 71, 81, 83, 84,          |
| 27-29, 35                      | 191-193, 227, 245,              | effective ... 81               | everybody ... 92, 230          | 91, 94-96, 98, 111,              |
| designed ... 140, 184          | 246                             | effectively ... 62             | everything ... 140, 247, 248   | 145, 150, 151, 157,              |
| despite ... 75                 | documents ... 20, 21, 35,       | effectuate ... 94-96, 215, 232 | evidenced ... 110              | 159, 168, ... 179, 182,          |
| detectors ... 186              | 45, 50, 105, 106, 112,          | efforts ... 75, 189, 193       | evidences ... 245              | 183, 187-189, 193,               |
| determination ... 72, 78       | 116, 130-132, 193,              | eight ... 178, 199, 235-238    | EXAMINATION ... 6              | 194, 200, 210, 211,              |
| determine ... 78, 158, 180,    | 194, 212                        | eighteen ... 181               | Examining ... 15               | 213, 219, 220, 225,              |
| 231                            | dollar ... 8, 16, 56, 79, 82,   | eighty ... 16                  | example ... 8, 13, 63, 64, 186 | 235, 236, 238-242, ...           |
| determined ... 71, 78, 91,     | 94-96, 110, 111,                | elderly ... 88, 101, 207       | exceed ... 225                 | 245-247                          |
| 229                            | 113-116, 118,                   | elect ... 184                  | except ... 6, 88, 101, 179,    | fairly ... 26, 103, 196          |
| determining ... 139            | 127-129, 137, 147,              | elected ... 21, 121, 163       | 217                            | faith ... 158                    |
| developed ... 150, 151, 169,   | 150, 152, 175, 220,             | election ... 184               | excerpt ... 124                | fall ... 167, 199                |
| 193                            | 221, ... 234, 238, 240,         | eleven ... 180                 | exchange ... 236               | fallback ... 107-109, 118,       |
| development ... 25, 27, 28,    | 243, 248                        | email ... 164, 166, 168, 209,  | exempt ... 208, 243            | 122, 138, 142                    |
| 31, 63, 64, 100, 104,          | dollars ... 8, 9, 80-82, 84,    | 210                            | exercise ... 42, 82, 87, 97    | falling ... 214                  |
| 138, 157, 187,                 | 95, 102, 103, 113,              | emerged ... 169                | exercised ... 119              | false ... 116                    |
| 191-193, 213                   | 119, 137, 139, 142,             | employed ... 18                | exhausted ... 134              | far ... 8, 19                    |
| DH ... 104                     | 153, 182, 186, 187,             | employee ... 19, 24, 162, 166  | Exhibit ... 16-19, 35, 45-47,  | Farm ... 27, 35, 150, 193,       |
| DHCD ... 100, 105, 106,        | 216, 219, 225, ... 230,         | employees ... 24               | 49-51, 54-57, 59, 60,          | 210                              |
| 109, 139                       | 231, 233, 237, 243,             | enable ... 29, 171, 180, 184   | 64, 66-68, 73-75, 79,          | fashion ... 190, 205             |
| dialogue ... 158               | 244                             | enables ... 211                | 81, 105, 110, 121, 122,        | father ... 87, 88, 101           |
| difference ... 85, 156, 157,   | donated ... 80, 146, 148        | encountered ... 170            | 124, ... 137, 138, 154,        | favor ... 64                     |
| 208                            | donation ... 80, 134, 147       | encourage ... 200              | 155, 164-166, 191,             | feasibility ... 194              |
| different ... 29, 33, 62, 91,  | Donna ... 167                   | encouraging ... 200, 222       | 193, 206, 209, 210,            | February ... 6, 45-47, 49, 54,   |
| 121, 144                       | door ... 106                    | encumber ... 150, 157          | 212, 219, 220, 222,            | 56, 57, 61, 64-66, 74,           |
| differentiate ... 181          | Dorothy ... 45-49, 56, 125      | endorse ... 167                | 225, 227, ... 228, 234,        | 165-168, 191, 192, 247           |
| difficult ... 40, 215          | double ... 118, 194             | endowment ... 233              | 235, 238, 242, 244,            | federal ... 12, 13, 112, 117,    |
| difficulty ... 87, 170         | doubled ... 64                  | ends ... 156, 232, 233         | 246, 247                       | 118                              |
| dilapidated ... 196            | downstairs ... 59               | Enforcement ... 11             | existed ... 19, 223            | fee ... 181                      |
| diligence ... 72, 110, 111,    | dozens ... 124                  | engages ... 139, 140           | existence ... 129, 229, 245    | feel ... 42, 64                  |
| 113, 118, 140, 142             | draft ... 81, 154               | England ... 24, 115            | exists ... 131                 | feels ... 104                    |
| dimensional ... 166            | drafted ... 155                 | enhance ... 243                | exit ... 99                    | fees ... 181                     |
| directions ... 178             | drafting ... 67                 | ensure ... 104                 | exits ... 136, 164, 196, 222,  | fellows ... 21, 192              |
| directly ... 21                | drawn ... 148                   | ensured ... 195                | 234                            | felt ... 215                     |
| director ... 7, 8, 14, 20, 24, | Drew ... 192                    | ensures ... 243                | expect ... 84, 141, 226, 242   | FETOUH ... 13, 17, 19, 20,       |
| 41, 47, 49, 104, 115,          | drop ... 228                    | enter ... 16, 129, 158, 183,   | expectation ... 39, 84, 140,   | 22, 27-34, 36, 38-43,            |
| 120, 161, 176, 230,            | dropped ... 228                 | 242                            | 141, 227                       | 47, 49-51, 53, 55-58,            |
| 232                            | due ... 72, 110, 111, 113,      | entered ... 185                | expected ... 84, 85, 90, 142,  | 61-63, 65, 68, 70-72,            |
| Directors ... 48, 110, 113,    | 118, 126, 132, 136,             | entering ... 244               | 150, 179                       | 74-77, ... 79, 80, 82,           |
| 222                            | 140, 142, 153                   | enters ... 211, 215            | expecting ... 141              | 85, 86, 89, 90, 92, 97,          |
| disagreeing ... 223            | duly ... 6                      | entertain ... 57               | expending ... 68               | 98, 111, 114-116,                |
| disagrees ... 172              | <b>E</b>                        | entire ... 44, 186, 218        | expenses ... 182, 233          | 123-128, 132, 135,               |
| disappointed ... 190           | each ... 7, 155, 163, 243       | entirely ... 117, 130, 150,    | experience ... 185             | 136, 139-144, ...                |
| disclose ... 120               | earlier ... 30, 60, 61, 95, 97, | 235                            | experienced ... 138, 204       | 146-150, 152-154, 156,           |
| disclosure ... 206             | 104, 107, 127, 144,             | entirety ... 148               | expert ... 62, 164             | 158-163, 165, 168,               |
| disconnect ... 216, 217        | 148, 155, 158, 169,             | entities ... 17, 229, 241      | expertise ... 104, 147         | 170, 172-174, 177,               |
| discourage ... 214             | 208, 217, 228, 229              | entitled ... 128               | explain ... 225, 226           | 179, 183-189, 191, ...           |
| discouraged ... 214            | early ... 10, 26, 88, 98, 168,  | entity ... 18-20, 27, 39, 229, | explained ... 107              | 194, 195, 198, 201,              |
| discusses ... 154              | 210, 229                        | 243                            | explanation ... 128            | 204, 207-209, 211,               |
| discussing ... 25, 51, 52, 65, | earmarked ... 79, 115           | environmental ... 11, 13, 69   | explicit ... 204               | 212, 214, 217, 218,              |
| 74, 203, 204                   | earned ... 221                  | envisioned ... 170             | explicitly ... 73, 158, 159    | 220, 222-226, 234,               |
| discussions ... 23-26, 28, 29, | earnest ... 80, 81, 149, 156,   | envisions ... 107              | expressing ... 99              | 237, ... 239, 240, 242,          |
| 33, 34, 41-44, 189,            | 181, 182, 186, 218,             | equivalent ... 103             | expressly ... 88, 101          | 244-246, 248                     |
| 199, 214, 215, 219             | 219                             | Ernest ... 18                  | extension ... 157, 167, 178    | field ... 69                     |
| dishonesty ... 204             | easily ... 216                  | Esquire ... 125                | extensive ... 147              | Fifteen ... 180, 182             |
| Dismiss ... 113, 119, 121,     | ECKER ... 34, 75, 89, 92,       | essence ... 151                | extensively ... 67             | fifth ... 241                    |
| 163                            | 114, 129-132, 135,              | essential ... 156              | external ... 70                | fifty ... 9, 32, 94, 100         |
| disregard ... 175              | 141, 146, 148, 153,             | essentially ... 17, 48, 143,   | <b>F</b>                       | figure ... 71, 185, 229, 248     |

## DEPOSITION OF CRAIG MACDONNELL

MINDEX by Kenson

| Word . . . . . Page             | Word . . . . . Page            | Word . . . . . Page            | Word . . . . . Page            | Word . . . . . Page            |
|---------------------------------|--------------------------------|--------------------------------|--------------------------------|--------------------------------|
| figuring ... 98                 | 121, 123, 127, 129,            | gift ... 224                   | hard ... 61, 70, 126, 199,     | 105, 124, 137, 154,            |
| filed ... 86, 112, 119, 127,    | 143, 145-147, 150,             | give ... 35, 94, 95, 193, 206, | 200, 226, 236                  | 164, 166, 191, 193,            |
| 162                             | 152, 176, 177, 220,            | 219, 233                       | harmless ... 51, 155           | 210, 212, ... 228, 234,        |
| filing ... 20, 116, 117         | 221, 226, 227...               | given ... 39, 65, 69, 95, 96,  | Hatch ... 7, 8                 | 238                            |
| filled ... 104, 106             | Fourteen ... 180               | 130, 134, 146-148,             | HDSP ... 117                   | identified ... 6, 71, 79, 84,  |
| final ... 98                    | fraught ... 143                | 158, 172, 182, 218,            | head ... 245, 246              | 90, 160, 180, 216              |
| finance ... 18, 19, 79, 81,     | free ... 129                   | 231                            | heading ... 36, 210            | identifies ... 139             |
| 115, 116, 126, 217              | frequency ... 44               | giver ... 87                   | headquarters ... 7             | identifying ... 157, 185       |
| finances ... 61, 217            | Friends ... 37, 80, 81, 165,   | Glassman ... 77, 78, 108,      | hear ... 59, 174, 195          | imagination ... 226            |
| financial ... 18, 67, 70, 87,   | 190, 193, 212-214,             | 206                            | heard ... 17, 77, 160, 162,    | imagine ... 153                |
| 120, 231, 242-244               | 216-219                        | go ... 11, 12, 20, 28, 43,     | 170, 182, 190, 247             | imagined ... 139, 141, 151,    |
| Financing ... 29, 60, 72,       | front ... 9, 15, 18, 51, 80,   | 52-54, 59, 66, 67, 75,         | hearings ... 27, 44            | 171, 184, 185, 236             |
| 107-109, 133, 157,              | 101, 106, 145, 159,            | 89, 96, 103, 104, 112,         | heated ... 199                 | imagines ... 63, 142, 153,     |
| 184, 186, 217                   | 168, 169, 200, 208             | 114, 117, 121, 129,            | heck ... 141                   | 185, 187                       |
| Fincorn ... 81, 82              | frontage ... 166, 167          | 131, 133, ... 138, 141,        | held ... 51, 52, 155           | immediate ... 103              |
| find ... 74                     | fronted ... 238                | 144, 150, 156, 159,            | help ... 14, 38, 100, 105, 188 | immediately ... 102            |
| finding ... 70                  | frustration ... 175, 216       | 160, 164, 166,                 | helpful ... 37, 96-98          | implying ... 102               |
| fine ... 161, 163, 175, 239     | frustrations ... 175           | 169-172, 174-176, 180,         | helping ... 205                | Importance ... 165             |
| finger ... 175                  | full ... 37, 63, 69, 90, 91,   | 186-188, 190, ... 194,         | helps ... 19, 81               | important ... 185, 230, 241,   |
| firm ... 202, 246               | 220, 243                       | 196, 197, 204, 213,            | hesitated ... 17               | 248                            |
| firms ... 10, 203, 247          | fully ... 70, 71, 75, 181      | 214, 222, 227, 228,            | high ... 165                   | imposed ... 129                |
| first ... 6, 19, 30, 31, 35-43, | function ... 121, 174          | 230, 245, 246                  | highly ... 143, 144            | impossible ... 75              |
| 45, 47, 50, 51, 53, 54,         | fund ... 17-19, 54, 57, 61,    | goals ... 178                  | hijinks ... 205                | improved ... 236               |
| 56, 57, 61, 64, 66, 67,         | 70-74, 90, 109, 113,           | going ... 15, 17, 24, 42, 48,  | Hill ... 201, 202              | imprudent ... 227              |
| 72-74, 82, 87, 97, 105,         | 117, 119, 122,                 | 51, 62, 64, 67-69, 74,         | hired ... 104                  | impugning ... 131              |
| 106, ... 110, 116, 118,         | 137-139, 142, 170,             | 75, 81, 83, 87, 90-93,         | Hoar ... 123, 124, 201         | inaccurate ... 65, 66, 82, 83, |
| 119, 121, 130, 137,             | 174, 188, 213-218, ...         | 96, 97, 100, 101, 105,         | hold ... 17, 52, 76, 139, 182  | 116, 117                       |
| 154, 156, 158, 161,             | 222, 227, 231, 239,            | 112, ... 118, 119, 122,        | honest ... 82, 204             | inapplicable ... 158, 178, 181 |
| 166, 170, 177, 178,             | 240                            | 124, 126, 129-132,             | honestly ... 248               | inapposite ... 63, 178, 179,   |
| 182, 192, ... 193, 207,         | funding ... 57, 107, 108       | 134-138, 145, 147,             | honor ... 73, 74               | 184                            |
| 212, 235-237, 242               | funds ... 54-56, 70, 71, 77,   | 148, 150-152, 154,             | honored ... 74                 | inappropriate ... 62, 146, 178 |
| fiscal ... 232, 233             | 79, 80, 90, 95, 96, 99,        | 160, 164, ... 165, 168,        | hope ... 54, 55, 85, 104, 175, | inclusion ... 146              |
| Fish ... 10                     | 100, 102-104,                  | 174, 177, 180, 181,            | 236, 237                       | income ... 31, 83, 190, 209    |
| Fisheries ... 11, 12            | 109-111, 117, 118,             | 186, 188, 190, 191,            | hoped ... 54-56, 68, 90, 118,  | inconsistent ... 122           |
| fists ... 205                   | 121, 122, 126, ... 138,        | 193, 196, 197, 212,            | 190                            | incorporated ... 183           |
| five ... 24, 40, 42, 45, 59,    | 139, 203, 215-217,             | 213, 215, 216, ... 218,        | hopefully ... 233              | incorrect ... 56               |
| 176, 183, 186, 191,             | 219, 220, 222, 231,            | 219, 226, 227, 233,            | horizon ... 142, 214           | incorrectly ... 133            |
| 222, 236-238                    | 232, 238, 241, 243             | 236, 237                       | horse ... 35, 150              | increase ... 100, 167          |
| fluctuates ... 231              | further ... 83, 131, 157,      | gone ... 89, 106               | host ... 43                    | increased ... 100              |
| focus ... 31                    | 177, 197, 221, 222,            | good ... 59, 75, 158, 176,     | hostile ... 138                | increasingly ... 228           |
| fold ... 214                    | 226                            | 191, 196, 200-202,             | hour ... 59, 91                | indemnification ... 52, 53, 74 |
| folks ... 191, 219, 247         | future ... 215, 227, 229, 230  | 204, 224, 225                  | hourly ... 244                 | indemnify ... 53               |
| follow ... 110, 169             | <b>G</b>                       | Goodwin ... 123, 124, 201      | hours ... 124                  | indicated ... 100              |
| followed ... 151                | gain ... 147                   | gradual ... 78, 144            | house ... 22, 196              | indicating ... 112, 127, 130,  |
| following ... 113, 156, 191     | game ... 62, 98                | gradually ... 228              | household ... 83               | 245                            |
| follows ... 6, 112, 183, 196    | gap ... 76, 78, 137, 138,      | graduate ... 12                | housekeeping ... 92            | indication ... 245             |
| fool ... 248                    | 217, 222                       | grant ... 54, 93, 100, 105,    | houses ... 220                 | indistinguishable ... 162      |
| forcing ... 204                 | gaps ... 77                    | 106, 123, 138, 139,            | housing ... 31, 54, 100, 104,  | individually ... 245           |
| foregoing ... 150               | gather ... 29                  | 167                            | 137, 138, 157, 169,            | influenced ... 62, 183         |
| forestry ... 27                 | gave ... 223                   | granted ... 164, 165           | 172, 182, 184, 186,            | influential ... 197, 201       |
| forfeited ... 119               | gear ... 76                    | grants ... 116                 | 189, 190, 193-195,             | informal ... 247               |
| forgive ... 212                 | general ... 9, 25, 28, 37, 60, | greases ... 145                | 223, 224, 230, ... 244         | informed ... 87, 88, 101, 116  |
| form ... 6, 16, 18, 145, 223    | 62, 131, 138, 230,             | greater ... 77, 222, 223, 226  | hugely ... 229, 231            | infringe ... 160               |
| formal ... 242, 247             | 231, 246                       | grounds ... 164                | Hull ... 148                   | initial ... 26                 |
| forth ... 165, 181, 183, 200    | Generally ... 17, 33, 35, 99,  | group ... 214, 215             | hundred ... 9, 16, 40, 42, 56, | initially ... 100, 187         |
| forward ... 43, 74, 75, 103,    | 104, 126, 197, 215,            | guarantees ... 52, 155         | 69, 84, 85, 89, 94-96,         | initiate ... 31, 34, 41        |
| 104, 112, 117, 121,             | 216                            | guess ... 40, 107, 159, 176,   | 100, 127, 129, 137,            | initiated ... 31-33            |
| 141, 142, 144, 149,             | generate ... 109               | 183                            | 138, 143, 145-147,             | initiating ... 41              |
| 154, 156, 157, 166,             | generates ... 235              | guys ... 163                   | 150, 152, ... 177, 182,        | initiation ... 42              |
| 170, 171, 174, ... 179,         | generic ... 77                 | <b>H</b>                       | 199, 220, 221,                 | inkling ... 168                |
| 180, 182, 188, 190,             | gentleman ... 18               | half ... 9, 59, 91, 230, 231   | 235-238, 240                   | inserting ... 169              |
| 194, 213, 214, 222,             | get ... 42, 57, 67, 68, 71,    | halfway ... 19, 83             | hundreds ... 42, 131, 132      | insertion ... 169              |
| 227, 228, 230, 233,             | 90, 92, 96, 112, 122,          | Hall ... 202                   | hundredth ... 42               | inside ... 205                 |
| 236, 239                        | 123, 136, 141, 152,            | hand ... 54, 74, 83, 102, 119, | husband ... 92                 | insiders ... 120               |
| found ... 95, 113, 185          | 153, 159, 166, 168,            | 230, 241                       | hypothetical ... 227           | insist ... 129                 |
| foundation ... 179              | 170, 189, 200, ... 205,        | handling ... 32                | <b>I</b>                       | insistence ... 96              |
| foundations ... 216             | 209, 224, 226, 229             | handouts ... 192               | i.e. ... 25, 74, 159           | institution ... 14, 163, 207,  |
| founder ... 108, 206            | gets ... 63, 64, 143, 174,     | happily ... 146                | identification ... 16-18, 35,  | 208                            |
| four ... 56, 69, 84, 95, 96,    | 235                            | happy ... 133, 190, 194        | 45, 49, 51, 64, 75, 79,        | instruct ... 160, 164          |

## DEPOSITION OF CRAIG MACDONNELL

MINDEX by Kenson

| Word . . . . . Page  | Word . . . . . Page   | Word . . . . . Page  | Word . . . . . Page  | Word . . . . . Page  |
|--|---|--|--|--|
| instruction ... 133  | justification ... 191   | lawyer ... 10, 11, 14, 202, 203  | 150, 155, ... 157, 176, 191, 193, 194, 201, 212, 219, 222, 234, 235, 241, 243, 247   | market ... 55, 110, 111, 122, 138, 147, 217, 225, 237  |
| insurance ... 180  | <b>K</b>  | lawyers ... 11, 141, 229, 246  | looked ... 70, 71, 177, 231  | markets ... 76, 218  |
| intend ... 113   | Kachajian ... 87, 92, 93, 99, 129, 136, 137, 163, 164, 197, 198, 200, 202, 203, 207, 211, 218, 222, ... 226, 228, 234, 236  | lead ... 186   | Looking ... 20, 31, 36, 50, 54, 57, 67, 99, 107, 125, 137, 166, 172, 178, 194, 198, 228, 244   | Marr ... 248   |
| intended ... 27, 70, 71, 73, 91, 111, 118, 142, 171, 187, 220, 230, 243  | Karen ... 165-167, 169  | learn ... 102, 240   | lore ... 154, 185  | Mass ... 6, 37   |
| intending ... 83, 123, 184   | Keegan ... 10, 11, 13   | leave ... 10, 14, 72, 81, 84, 92, 196, 207   | lose ... 171, 247  | Massachusetts ... 6-8, 12, 14, 20, 47, 49, 58, 70, 104, 115-117, 120, 122, 142, 161, 176, 187, 230, 232, ... 233   |
| intends ... 110, 111, 122, 138, 142  | Kelleher ... 166, 169   | leaving ... 94, 95   | loss ... 138, 188  | materialize ... 139, 142, 219, 227   |
| intention ... 55, 69, 74, 75, 85, 90, 113, 141, 185, 187, 207, 210, 220  | Kennedy ... 164-167   | led ... 129, 133, 169  | lost ... 170   | matter ... 69  |
| intentionally ... 189  | kindness ... 124  | left ... 13, 20, 45, 83, 106, 149, 205, 206, 208, 226  | lot ... 29, 61, 85, 118, 121, 144, 159, 166, 167, 190, 194, 214, 221, 231, 244   | matters ... 18   |
| intentions ... 140   | kinds ... 63, 211, 246  | legal ... 11, 14, 62, 72, 73, 156, 164, 197, 201, 223, 242, 246, 247   | lots ... 29, 55, 56, 69, 71, 72, 74, 78, 84, 90, 91, 167, 168, 170, 237, 238   | Maynard ... 205  |
| Interconnect ... 106   | kinks ... 169   | lend ... 152   | low ... 31, 190  | McClennen ... 10   |
| interest ... 30, 96, 139, 220, 221, 236  | knowing ... 140   | length ... 203   | Lower ... 197, 200, 247  | McLAUGHLIN ... 6, 16-18, 37, 38, 42, 52, 53, 59, 60, 62, 63, 86, 91-93, 99, 101, 109, 110, 112, 121, ... 125, 128-134, 137, 144, 146, 149, 160-164, 174-176, 191, 196-198, 206, 228, 234, ... 238, 240, 247, 248 |
| interests ... 139  | knowledge ... 19, 21, 25, 168, 206  | letter ... 45, 47, 49, 50, 56, 57, 60, 74, 110, 137, 147, 165, 210-213, 220, 222, 225, 228, 234-236, 238, ... 240-243                            | luck ... 176   | MCLE ... 13  |
| interim ... 140  | known ... 26, 27, 68, 210, 229  | letters ... 210, 211, 220  | Luncheon ... 92  | means ... 29, 38, 57, 77, 128, 142, 173, 179, 203, 226, 245  |
| intern ... 28, 123   | KUN205 ... 35   | level ... 228, 246   | lying ... 214  | meant ... 58, 60-62, 78, 227, 237  |
| internal ... 110, 113, 118   | KUN211 ... 37   | liability ... 135  | <b>M</b>   | measured ... 71  |
| interns ... 29, 124  | KUN336 ... 105  | license ... 6  | MacDonald ... 37   | Mechanism ... 107  |
| interpretation ... 131   | KUN474 ... 45   | LID ... 106  | MacDonnell ... 6, 37, 49, 62, 81, 87, 88, 92, 101, 106, 113, 119, 121, 137, 162-165, 193, 196, 209, ... 210, 234, 238  | medication ... 9   |
| intervention ... 247, 248  | Kunelius ... 21-25, 27, 30, 31, 33, 34, 36, 45, 55, 67, 69, 71, 74, 76, 79, 80, 82, 86-88, 90, 91, 93-96, ... 99-103, 108, 117, 119, 121, 127, 129, 130, 132, 135, 136, 140-142, 147, 149, 150, ... 152, 154, 156, 159, 165, 167, 169-172, 176, 177, 179-182, 187, 188, 193, 195-197, ... 199-203, 205-210, 212, 218-221, 225, 231, 232, 235, 236, 241, 244, 247, 248 | limit ... 160  | Madam ... 86, 131  | meet ... 26, 31, 40, 44, 50, 58, 122, 156, 171   |
| intimidated ... 197  |   | limitation ... 8, 9  | Maine ... 12   | meeting ... 26, 30, 31, 35, 36, 40-42, 46, 47, 52, 64-67, 81, 82, 87, 90, 100, 132, 166, 169, 191-193, ... 197, 198, 200, 202-206, 247, 248  |
| intimidating ... 205   |   | limited ... 203  | maintain ... 180   | meetings ... 28, 40, 42-44, 61, 198, 199, 204  |
| introduction ... 28  |   | line ... 46, 51, 107-111, 113-116, 118-120, 125, 126, 128, 138, 151, 175, 177, 187, 188, 206, 215-218, ... 227, 231, 233-235, 237, 241, 215, 222 | maintained ... 134   | member ... 33, 64, 120, 174, 247   |
| introductory ... 40  |   | lines ... 77, 119-121, 127, 215, 222   | make ... 28, 29, 32, 53, 54, 56, 59, 61, 64-66, 72, 74, 75, 79, 84, 86, 90, 100, 103, 110, 118, 129, 139, ... 146, 155, 164, 177, 181, 230, 232, 238, 239, 241 | members ... 44, 45, 189, 216   |
| invest ... 129, 227, 235   |   | liquid ... 231, 232  | maker ... 161  | memo ... 106   |
| investment ... 137, 236, 242, 244  |   | liquidated ... 71-75, 119, 141, 149, 156, 158, 171, 183, 207, 231  | making ... 36, 85, 117, 144, 145, 200, 219, 221  | memorandum ... 119, 121, 127   |
| involve ... 34, 160  |   | listed ... 14, 15, 82, 111, 122, 172, 177, 206, 214  | man ... 7, 107, 161, 174   | memorandums ... 127  |
| involvement ... 24, 26, 27, 209, 210, 243  |   | literally ... 204  | manage ... 38  | memories ... 162   |
| involves ... 29  |   | litigate ... 201-203   | managed ... 156  | memory ... 9, 17, 25, 34, 35, 51, 67, 94, 100-103, 123, 164, 165, 204, 209, 213, 216, 217, 219, 248...   |
| irreversible ... 192   |   | litigation ... 13, 33, 112, 203  | management ... 106   | merger ... 229   |
| IRS ... 211  |   | litigator ... 10, 12   | manager ... 37, 38, 105, 107, 113, 115, 116  | merits ... 203   |
| issue ... 40, 52, 53, 65, 74, 97-99, 128, 133-135, 144, 146, 149, 153, 156, 169, 170, 173, 174, 188, ... 201, 215, 216, 218-220, 239 |   | lives ... 165  | managers ... 29, 126   | Messrs ... 99, 129, 136, 198   |
| issued ... 15  |   | loan ... 140, 150, 157, 184, 220, 222, 223, 226, 227, 239  | many ... 11, 13, 24, 40, 42, 80, 92, 190, 191, 198, 215, 246   | met ... 40, 44, 50, 54, 87, 88, 101, 166, 171, 196, 199, 214, 241  |
| issues ... 13, 14, 43, 157-159, 168, 169, 215, 219   |   | loans ... 104, 120   | map ... 167  | method ... 215, 220  |
| Item ... 51, 122, 123, 155, 156, 197, 219, 220, 248  |   | lobbying ... 43, 209-212   | March ... 121, 232   | Michael ... 125, 214   |
| items ... 74   |   | local ... 29, 197  | Marilyn ... 45, 69, 71, 86, 158, 247   | Mike ... 59, 62, 125   |
| iteration ... 154  |   | located ... 146, 193   | mark ... 18, 227   | million ... 8, 9, 82, 94, 102, 238   |
| <b>J</b>   |   | long ... 11, 26, 97, 110, 168, 197, 202, 203, 218, 228, 229  | marked ... 15-18, 35, 37, 45, 49, 51, 64, 75, 79, 105, 124, 137, 154, 164-166, 191, 193, 209, 212, 228, ... 234, 238   |  |
| Jacobs ... 166-168   |   | look ... 15, 17, 29, 37, 47, 55, 64, 71, 72, 74, 75, 81, 93, 109, 121-123, 125, 138, 139, 145,   |  |  |
| January ... 36, 37, 39, 40, 42, 56, 79, 81, 84, 210, 238, 241-243  |   | latest ... 210   |  |  |
| Jim ... 197-199  |   |  |  |  |
| jive ... 83  |   |  |  |  |
| job ... 7  |   |  |  |  |
| John ... 12  |   |  |  |  |
| join ... 14  |   |  |  |  |
| joining ... 245, 246   |   |  |  |  |
| joins ... 81   |   |  |  |  |
| joint ... 81, 82, 163, 241, 246  |   |  |  |  |
| jointly ... 162  |   |  |  |  |
| Judge ... 114, 160, 175, 185   |   |  |  |  |
| July ... 121, 234  |   |  |  |  |
| June ... 121, 212, 213   |   |  |  |  |

## DEPOSITION OF CRAIG MACDONNELL

INDEX by Kenson

| Word . . . . . Page   | Word . . . . . Page  | Word . . . . . Page   | Word . . . . . Page   | Word . . . . . Page   |
|---|--|---|---|---|
| 103, 111, 113-116, 118, 127, 128, 175, 186, 230, 231, 233-235, 248  | nationally ... 230-232   | obligate ... 158  | 224   | 178   |
| mince ... 128   | natural ... 71   | obligated ... 156   | outlines ... 73   | perhaps ... 11, 42, 95, 99, 148, 172, 210   |
| minds ... 150, 187  | naturally ... 59, 154  | obligation ... 60, 71, 120, 122, 176, 177, 207, 208   | overdrawn ... 115   | period ... 34, 35, 40, 98, 199, 213, 214, 228, 232  |
| minimum ... 143   | near ... 22  | obtain ... 116, 117, 209, 215   | overpaid ... 224  | permanent ... 241   |
| Minor ... 110   | necessary ... 53, 54, 57, 70, 73, 84, 86, 90, 111, 113, 117, 121, 139, 142, 201, 202, 217, 222, 241  | obligations ... 71, 72, 94, 120, 241  | overruns ... 117, 118   | permit ... 167, 169   |
| minus ... 35, 106, 237  | needed ... 75, 85, 95, 98, 138, 157, 170, 196  | obstacle ... 133, 170   | overstated ... 216  | permits ... 63, 157, 165, 169, 170, 173, 194, 195   |
| misled ... 215, 219   | negotiated ... 140   | obtain ... 116, 117, 209, 215   | own ... 79, 83, 114, 140, 142, 147, 150, 176-178, 180, 183-185, 187, 215, 219, 237, 238 | Perry ... 49-52, 105, 106, 209-211, 238, 241  |
| missed ... 130, 210   | negotiating ... 172  | obtained ... 233  | owned ... 134, 229  | person ... 28, 32, 64, 65, 122, 134, 149, 192, 204  |
| mission ... 188   | neighborhood ... 24, 237   | obtaining ... 72, 73, 179, 194, 219   | owner ... 23, 24, 123   | personal ... 183, 185   |
| misspelled ... 18   | neither ... 86, 171  | occasionally ... 139  | owners ... 241  | personally ... 92, 93   |
| mistake ... 92  | Nelson ... 45, 46  | occasions ... 88, 101, 199  | <b>P</b>  | personnel ... 30  |
| mistakenly ... 148  | New ... 24, 115, 199, 228  | occupation ... 6  | P.M. ... 92, 136, 163, 197, 234, 248  | perspectives ... 144  |
| misunderstood ... 153   | nine ... 6, 104, 179, 199, 236, 237, 240   | occur ... 29, 30, 42, 43, 68, 89, 90  | Pabian ... 10   | Peter ... 21, 23, 25, 33-35, 86, 92, 137, 222, 226, 234                                   |
| mixing ... 164  | Nineteen ... 181   | occurred ... 35, 40, 42, 48, 51   | pace ... 216  | philanthropy ... 138  |
| money ... 19, 53-56, 61, 69-75, 77, 78, 80, 81, 84, 85, 90, 95, 96, 102, 112-116, 118, 119, 121-123, ... 126-128, 135, 136, 139, 141-144, 149, 153, 156, 174, 175, 181, 182, 184, 186-188, ... 196, 200, 205, 206, 214, 215, 217-219, 221-223, 225-227, 230, 231, 233, 236-239... | ninety ... 16  | occurring ... 31  | paid ... 80, 98, 151, 156, 181, 182, 188, 217, 218, 220, 225                            | Phillips ... 12   |
| monies ... 15, 79, 81, 182  | non ... 7, 14, 81, 153, 158, 167, 208, 243, 247  | occurs ... 29, 38   | paint ... 186   | phone ... 171   |
| month ... 157, 182  | nor ... 125, 131, 158, 183   | offer ... 236, 238, 239   | pan ... 71  | phrase ... 78   |
| monthly ... 220, 232  | normal ... 72, 73, 118, 182, 211   | offered ... 156   | parcel ... 145, 146, 150-152, 157, 178, 186, 187, 193, 225, 236                         | pick ... 91   |
| months ... 40, 121, 208, 220  | Normally ... 32, 41, 42, 231   | offers ... 236  | parcels ... 55, 68, 70, 146, 151, 229   | picks ... 83  |
| morning ... 57, 66, 82, 88, 89  | Norris ... 6, 16, 92, 99, 129, 136, 196-198, 215   | office ... 7, 18-20, 23, 24, 26, 30, 41, 120, 126, 166, 197, 198, 204   | parenteses ... 150  | picture ... 35, 125   |
| mortgage ... 91, 93-99, 123, 127, 129-131, 133-136, 145-147, 152, 177, 178, 183, 186, 221   | northeast ... 7  | offices ... 24  | park ... 43   | piece ... 22, 142, 164, 243   |
| mortgagor ... 122, 123  | notary ... 6   | official ... 21, 44   | participate ... 108   | pieces ... 29, 83, 85, 94, 148, 159   |
| Mosaic ... 27, 28, 93-95, 129, 134, 136, 140, 144, 145, 148, 170-172, 179, 184, 189-191, 207, 223-225, ... 230  | note ... 18, 19, 47, 64, 94, 96, 145, 160, 162, 177, 220, 221  | officials ... 26, 39, 40, 42, 43, 73, 74  | participating ... 67  | place ... 7, 35, 43-45, 119   |
| mother ... 87   | noted ... 86, 146  | often ... 44  | particularly ... 228, 229   | placed ... 133  |
| Motion ... 113, 119, 121, 163   | notice ... 16, 17, 45  | Old ... 6, 32, 87   | parties ... 92, 159, 163, 234, 242  | Plaintiff ... 6, 16   |
| motivated ... 25  | notified ... 87  | onboard ... 140   | partner ... 10, 11, 242, 244  | plan ... 103, 104, 107, 109, 117, 138, 142, 167, 170, 176, 200, 206, 227, 229, 230        |
| mouth ... 221   | noting ... 177   | one ... 19, 27, 31, 32, 40, 45, 48, 50, 52, 55, 56, 64, 70, 74, 78, 79, 83, 85, 87, 89, 92, 94, 95, 107, 117, ... 126, 127, 130, 137, 138, 140, 142, 143, 145, 151, 162, 166, 168, 172, 186, 190-192, ... 198, 208, 212, 214, 217, 221, 222, 235, 236, 241, 242 | partners ... 124, 241   | planned ... 28  |
| move ... 76, 86, 145, 149, 170, 180, 236-238  | notion ... 147, 164, 184, 227  | open ... 52, 54, 94, 95, 99, 137, 204   | partnership ... 235, 240-242, 245-247   | planning ... 42, 81, 165-168, 221   |
| moving ... 179, 194   | notwithstanding ... 140, 150, 245  | operation ... 15, 173   | partnerships ... 246, 247   | play ... 241  |
| much ... 34, 56, 78, 80, 84, 85, 97, 98, 119, 124, 143, 144, 160, 177, 206, 215, 218, 219, 223, 230, ... 231, 233, 236  | numbers ... 177  | operations ... 120  | parts ... 94, 156   | played ... 171  |
| multilateral ... 107  | Nutter ... 10  | opinion ... 186   | passed ... 67   | players ... 198   |
| multiple ... 117  | <b>O</b>   | opposed ... 89  | past ... 74, 150, 206, 216  | pleased ... 189   |
| municipal ... 40, 42  | object ... 62, 116, 130, 133, 135, 146   | option ... 98, 136  | path ... 169, 229   | plugging ... 228  |
| municipalities ... 37   | objected ... 130-132, 164  | optional ... 178  | pausing ... 214   | pocket ... 200, 243   |
| municipality ... 158  | objecting ... 133  | ordain ... 34   | pay ... 69, 83, 90, 181, 182, 187, 201, 219, 221, 235, 239                              | Pointing ... 15, 192  |
| <b>N</b>  | Objection ... 8, 13, 14, 17, 19-22, 27-34, 36, 38-43, 47, 49-51, 53, 55, 57, 58, 61-63, 65, 68, 70-77, ... 79, 80, 82, 85, 86, 88-91, 97, 98, 109, 111, 112, 114-116, 123-130, 132, 134-136, ... 139-156, 158, 159, 165, 168, 170-174, 177, 179, 183-189, 191, 194, 195, 198, ... 201, 204, 207-212, 214, 217, 218, 220, 222-226, 234, 237, 239, 240, 242, 244-248 | order ... 37, 41, 44, 50, 84, 95, 96, 114, 122, 123, 155, 185, 215, 218, 231, 232, 236, 244   | payback ... 237   | political ... 30, 44  |
| named ... 21  | objecting ... 133  | organization ... 7, 81, 128, 131, 139, 158, 233   | paying ... 113, 236, 239  | polls ... 192   |
| names ... 10  | Objection ... 8, 13, 14, 17, 19-22, 27-34, 36, 38-43, 47, 49-51, 53, 55, 57, 58, 61-63, 65, 68, 70-77, ... 79, 80, 82, 85, 86, 88-91, 97, 98, 109, 111, 112, 114-116, 123-130, 132, 134-136, ... 139-156, 158, 159, 165, 168, 170-174, 177, 179, 183-189, 191, 194, 195, 198, ... 201, 204, 207-212, 214, 217, 218, 220, 222-226, 234, 237, 239, 240, 242, 244-248 | organizations ... 38  | payment ... 114, 195  | portion ... 130, 131, 133-135, 145, 147, 148, 185, 187, 224                               |
| Nasson ... 12   | objections ... 6, 164  | organized ... 12, 19, 117   | payments ... 219, 220   | portions ... 55, 69, 148  |
| national ... 7, 48, 81  | objective ... 42, 167  | otherwise ... 76, 92, 110, 131, 142, 152, 192, 209, 243   | pays ... 235  | position ... 8, 11, 21, 105, 109, 118, 122, 140, 161, 162, 202-204, 212                   |
|   |  | outcome ... 34, 172, 190, 200, 243  | Pelletier ... 123, 125, 228   | positions ... 17  |
|   |  | outlined ... 51, 57, 74, 75,  | penalties ... 117   | possibility ... 26, 29, 33, 36, 39, 42, 43, 71, 72, 93, 127, 128, 205, 208, 212, 213, 230 |
|   |  |   | pendency ... 182  | post ... 68   |
|   |  |   | people ... 23, 24, 30, 42, 124, 149, 165, 190-192, 203, 212, 214, 224, 246              | posts ... 52, 155   |
|   |  |   | percent ... 82, 83, 89, 157, 167, 183, 220  | potential ... 22, 23, 29, 32, 34, 127, 129, 158, 159, 219                                 |
|   |  |   | percentage ... 161  | power ... 225   |
|   |  |   | perception ... 176, 177   | practice ... 10, 12, 13   |
|   |  |   | perfect ... 180   |   |
|   |  |   | perform ... 61, 156, 178, 239   |   |
|   |  |   | Performance ... 52, 156, 157,   |   |



## DEPOSITION OF CRAIG MACDONNELL

INDEX by Kenson

| Word . . . . . Page             | Word . . . . . Page           | Word . . . . . Page             | Word . . . . . Page              | Word . . . . . Page             |
|---------------------------------|-------------------------------|---------------------------------|----------------------------------|---------------------------------|
| practiced ... 13                | 126, 139, 141-144,            | 147-149, 151, 154,              | receiving ... 94, 106, 166       | replicate ... 139               |
| practicing ... 13               | 156, 157, 170, 171,           | 155, ... 157, 163, 164,         | recognize ... 49, 51, 137, 165   | report ... 7, 8, 35, 105        |
| practitioners ... 185           | 183, 184, 187, ... 188,       | 169, 170, 172, 177,             | recognizes ... 211               | representation ... 39           |
| pre ... 34, 167                 | 190, 191, 199, 201,           | 178, 180, 182, 183,             | reconfiguration ... 151          | representations ... 87, 112,    |
| precede ... 238                 | 203, 205, 208, 211,           | 186, 189, 194, 195,             | reconfigure ... 230              | 183                             |
| prepared ... 105, 107, 160      | 213-217, 223, 224,            | 197, 199, ... 200, 208,         | reconstructed ... 203            | representative ... 166, 207     |
| present ... 6, 81, 82, 92, 136, | 227, 228, 230, 236, ...       | 215, 218, 221, 222,             | recover ... 181                  | representatives ... 29, 199     |
| 163, 198, 234, 247              | 243, 244                      | 224, 226, 231, 232,             | recovered ... 238                | request ... 130, 155, 211, 241  |
| presentation ... 28, 192        | projects ... 24, 29, 42, 70,  | 236, 237                        | Red ... 22, 23, 35, 37, 68, 80,  | requested ... 92, 117, 130,     |
| presentations ... 28            | 77, 89, 104, 126, 139,        | purchaser ... 63, 136           | 81, 109, 165, 187, 190,          | 193                             |
| presented ... 133, 156          | 141, 231, 233, 241            | purchases ... 154               | 192, 193, 212-214,               | requests ... 211                |
| Preservation ... 64, 65, 68,    | prominent ... 203             | purchasing ... 67, 74, 189      | 216-219                          | require ... 58, 129, 144, 156,  |
| 247                             | promissory ... 145, 177,      | pursuant ... 119, 130           | redefining ... 152               | 168, 176, 177, 179,             |
| president ... 19, 108, 120      | 220, 221                      | pursuit ... 243                 | redevelopment ... 151            | 180, 185, 195                   |
| prevail ... 203                 | properties ... 85, 95, 190    | putting ... 105, 154, 190       | redraw ... 151                   | required ... 60, 61, 96, 98,    |
| prevent ... 31, 207             | property ... 8, 21-27, 29-31, | <b>Q</b>                        | reduced ... 199                  | 113, 129, 151, 154,             |
| prevented ... 129, 170, 179,    | 33, 34, 36, 38, 52, 54,       | Quarterly ... 232               | reduction ... 147                | 166, 169, 180, 194,             |
| 190                             | 67, 69-71, 73, 74, 76,        | quarters ... 193                | referenced ... 110, 111, 122,    | 222, 232                        |
| preventing ... 193              | 78, 79, 83, 87, 88, 91,       | querying ... 164                | 125, 138, 176                    | requirement ... 55, 56, 68,     |
| prevention ... 31               | 95, ... 96, 98,               | questioning ... 146, 214, 215   | references ... 157, 206          | 145, 189, 246                   |
| prevents ... 179                | 101-103, 107, 108,            | quick ... 93                    | referencing ... 60               | requirements ... 57, 75, 156,   |
| previously ... 164, 216, 236,   | 111-114, 119, 121,            | quickly ... 76, 87, 181         | referred ... 54, 55, 57, 61, 68, | 177                             |
| 240                             | 126, 129, 130,                | quintessential ... 161          | 93, 103, 104, 201, 206,          | requires ... 176                |
| price ... 69, 78, 79, 91, 94,   | 133-135, 139, 141,            | quote ... 58, 68, 101, 109,     | 215-218, 227                     | requiring ... 133               |
| 97, 137, 147, 154, 157,         | 143, ... 145, 147, 154,       | 111                             | refers ... 55, 123, 124, 177,    | resale ... 143                  |
| 177, 178, 182-184,              | 155, 165, 167, 170,           | quoting ... 155                 | 183, 248                         | reserve ... 6                   |
| 186, 195, 197, 199,             | 171, 173, 180, 182,           | <b>R</b>                        | refine ... 204                   | reserves ... 233                |
| 200, 222-224, ... 226,          | 184, 185, 189, 191,           | raise ... 19, 55, 85, 113, 114, | reflect ... 132                  | resident ... 21, 165            |
| 236, 237                        | 193, 199, ... 208-212,        | 118, 119, 121, 127,             | reflected ... 225                | resolve ... 158, 159            |
| print ... 155                   | 220, 222, 224, 225,           | 139, 141, 188, 213,             | reflects ... 211                 | resolved ... 169                |
| printed ... 64, 75, 180         | 229, 230, 232,                | 217, 218, 241                   | refreshed ... 84                 | resources ... 172, 184, 219,    |
| printout ... 75                 | 235-237, 241, 243             | raised ... 53, 55, 56, 80, 142, | refusal ... 37, 38, 40, 42, 43,  | 244                             |
| Prior ... 26, 27, 29, 36, 37,   | proposal ... 50, 205, 230,    | 146, 155, 215, 218-220          | 45, 47, 50, 51, 53, 54,          | respect ... 8, 22, 82, 91, 113, |
| 40, 48, 72, 73, 84, 86,         | 235, 237-240                  | raises ... 149, 156             | 56, 57, 61, 64, 67,              | 126, 127, 132, 136,             |
| 97, 143, 155, 158, 164,         | proposed ... 25, 27, 68, 192, | raising ... 54, 57, 61, 70-74,  | 72-74, 82, 87, 97, 119,          | 147, 153, 204                   |
| 171, 207, 223                   | 238                           | 90, 109, 117, 122,              | 154, ... 156, 158, 170,          | responded ... 64, 66            |
| private ... 54-57, 61, 70, 71,  | proposes ... 81               | 137-139, 170, 173,              | 192, 193, 207, 217,              | responding ... 81               |
| 74-77, 109-111, 117,            | proposing ... 199, 237        | 174, 188, 213, 214,             | 225                              | response ... 14, 101, 156,      |
| 122, 138, 188,                  | prospects ... 222, 227        | 216, 221, 222, ... 227,         | refusing ... 217                 | 157, 163, 211                   |
| 216-218, 227, 239,              | protecting ... 191            | 239, 240                        | region ... 7, 20, 24, 115        | responses ... 155, 162, 163     |
| 241, 243                        | protection ... 191            | range ... 16                    | Regional ... 7, 8, 45, 228       | responsibility ... 156          |
| privately ... 44, 55, 85, 122,  | provide ... 91, 130, 131,     | rate ... 244                    | registered ... 177, 208          | restating ... 210               |
| 215, 220                        | 138, 176, 180                 | rather ... 25, 134, 136, 169,   | registration ... 16, 18          | restriction ... 26, 33, 212     |
| privilege ... 149               | provided ... 35, 64, 97, 243  | 170, 186, 210, 211,             | regularly ... 24, 44             | restrictions ... 94, 206        |
| pro ... 124, 201-203, 209       | providing ... 117, 239        | 230                             | rejected ... 230                 | result ... 98, 104, 170, 171,   |
| problem ... 77, 97, 133, 168,   | provision ... 37, 91, 97-99,  | re ... 165, 189, 209, 227       | rejection ... 138, 230           | 190, 191, 197, 201,             |
| 169, 229                        | 145, 148, 149, 156,           | reach ... 86, 150               | relation ... 44                  | 208, 248                        |
| problematic ... 98, 143, 144,   | 158, 176-178,                 | reached ... 107, 149, 150       | relationship ... 177, 240, 246   | resulted ... 50, 97, 131, 171,  |
| 229                             | 183-186, 207, 209             | reaching ... 87                 | relative ... 97, 220             | 189, 237                        |
| problems ... 78, 143, 168       | provisions ... 63, 97, 148,   | reaction ... 19                 | relied ... 183                   | resulting ... 23, 52, 155       |
| procedure ... 72, 182           | 151, 152, 159-161,            | reader ... 61                   | relief ... 168                   | retain ... 130                  |
| Procter ... 123, 124, 201       | 163, 172, 173, 177,           | reads ... 137, 166, 196         | rely ... 73, 75, 149, 158, 184,  | retirement ... 100, 195, 196    |
| produce ... 132                 | 185, 186, 194                 | ready ... 61, 191, 233          | 207                              | return ... 239                  |
| produced ... 131, 132           | prudence ... 72               | realize ... 135, 170, 171       | relying ... 87, 117, 235         | reveal ... 164                  |
| product ... 235                 | prudent ... 142, 158, 188     | realized ... 100                | remain ... 46, 134               | revenue ... 233                 |
| production ... 6, 51            | Public ... 6, 7, 14, 18, 21,  | realizing ... 75, 170           | remained ... 99                  | reviewed ... 125                |
| profess ... 62                  | 27, 37, 45, 46, 48, 70,       | reason ... 13, 17, 22, 27, 65,  | remaining ... 134, 135, 148,     | reviewing ... 105, 217          |
| professional ... 13, 204        | 73-77, 81, 113,               | 66, 69, 82, 83, 96, 112,        | 186, 224                         | revising ... 151, 210           |
| profit ... 7, 14, 15, 20, 81,   | 117-119, 121, 162,            | 114, 151, 164, 168,             | remains ... 144                  | rights ... 37, 46, 94, 230      |
| 158, 208, 243                   | 192, 193, 208, ... 241,       | 188, 190, 191, 195,             | remind ... 36, 108, 126, 165     | ring ... 108                    |
| program ... 235                 | 243                           | 205, 211, ... 214               | renewed ... 118                  | rise ... 246                    |
| progress ... 193, 200, 217      | purchase ... 27, 38, 39,      | reasonable ... 114, 140-142,    | renovated ... 95                 | risk ... 79, 156, 188           |
| prohibit ... 116                | 52-54, 67, 69-71, 73,         | 227, 232, 239                   | renovation ... 85, 143           | risks ... 156                   |
| project ... 22-24, 29-32, 34,   | 74, 78, 79, 84, 90, 91,       | reasons ... 22, 27, 213, 222    | repaid ... 140, 234              | Road ... 6, 22, 23, 68, 165,    |
| 35, 37, 38, 40, 42, 43,         | 93-97, 102, 103, 107,         | receipt ... 157                 | repair ... 196                   | 187, 190, 193                   |
| 48, 66, 67, 69, 70, 72,         | 108, 111-113, ... 118,        | receive ... 55, 236             | repay ... 222, 227, 236          | Rob ... 77, 108                 |
| 75, 78, 79, 82, 83, 85,         | 119, 121, 128, 130,           | received ... 16, 45, 49, 105,   | repaying ... 220                 | Robert ... 77, 78, 108          |
| 90, ... 97, 104-107,            | 132, 136, 137,                | 106, 118, 154, 212              | replace ... 102                  | ROFR ... 57                     |
| 113, 116, 117, 121,             | 139-142, 144,                 |                                 | replaced ... 142                 | role ... 8, 14, 20, 41, 104,    |

## DEPOSITION OF CRAIG MACDONNELL

MINDEX by Kenson

| Word . . . . . Page   | Word . . . . . Page   | Word . . . . . Page  | Word . . . . . Page   | Word . . . . . Page   |
|---|---|--|---|---|
| 162, 232  | 101, 139, 170, 171, 237, 239  | smelled ... 162  | stop ... 91, 114, 173, 197  | <b>T</b>  |
| roles ... 241   | seller ... 61, 157, 172, 181, 186   | smoke ... 186  | stopgap ... 140   | table ... 61, 75, 90, 143, 153, 178, 205, 240   |
| room ... 59, 92, 99, 136, 164, 172, 174, 196, 198, 204, 211, 215, 222, 234  | selling ... 73, 239   | snuff ... 95   | storefront ... 204  | takeout ... 139, 140, 142, 227  |
| Ross ... 49-52, 105, 106, 209, 210, 241   | sent ... 50, 51, 105  | software ... 235   | storm ... 92  | taking ... 24, 93, 94, 179  |
| route ... 229   | sentences ... 81  | sold ... 27, 55, 68, 69, 85, 151, 173  | Stow ... 21, 25-28, 31-37, 41, 45, 49, 54, 56, 59, 64, 67, 71-74, 79, 81, 94, 113, 117, 119, 121, 129, ... 137, 138, 146-148, 154, 165, 167, 189, 191-193, 205, 209, 212, 216, 228, 245-247 | Talmadge ... 24, 25, 30   |
| rules ... 175   | separate ... 11, 18, 170, 182, 229  | sole ... 87  | straight ... 157  | tax ... 13, 147, 148, 208, 209, 235, 243  |
| run ... 202   | September ... 83, 121, 137, 178, 222, 225, 227, 228                                   | Sommerlad ... 164-168, 193   | Street ... 18, 204  | taxpayers ... 192   |
| running ... 32  | sequence ... 26, 50, 97   | sought ... 99, 100, 111, 116, 210, 230   | strength ... 202  | teaches ... 240   |
| Ruth ... 165, 167   | sequencing ... 166  | source ... 54, 55, 70, 83, 103, 139, 143, 239  | stretch ... 226   | team ... 99, 205  |
| <b>S</b>  | sequentially ... 10   | sources ... 54, 70, 71, 110, 111, 113, 122, 138, 139, 142, 143, 188, 216, 220, 232, 241                          | strict ... 187  | technical ... 210, 211  |
| sake ... 111, 230   | sequitur ... 153  | space ... 54, 94, 95, 137, 204   | strike ... 9, 39, 50, 53, 83, 121, 127, 144, 171, 222   | teeing ... 96   |
| salary ... 15, 16   | series ... 40   | span ... 11, 42, 43  | strong ... 196, 202, 243  | telephone ... 86, 101, 102  |
| sale ... 29, 54-56, 61, 68, 70-72, 74, 84, 85, 87-91, 93, 94, 96, 97, 103, 104, 117, 118, 122, 128, 132, ... 135, 136, 140, 142, 144, 147-149, 151, 163, 164, 169-172, 177, 186, 194, 200, 207, ... 215, 218, 220-222, 224, 227, 229, 237-239 | serious ... 197, 201  | speaks ... 144, 172  | structure ... 83, 167, 196  | telling ... 53, 54, 69, 73, 74, 82, 88-90, 102, 103, 142, 195, 196, 209, 213, 224   |
| sales ... 55, 94, 188   | services ... 209, 243   | special ... 36, 165, 167, 169  | structures ... 94, 100  | ten ... 83, 104, 180, 191   |
| satisfactorily ... 6  | set ... 104, 166, 183   | specific ... 56, 61, 79, 84, 104, 131, 217   | Stuckey ... 45-49, 56, 125  | tent ... 214  |
| satisfy ... 140   | seven ... 11, 19, 220   | specifics ... 167, 204   | studied ... 240   | tenure ... 20, 120  |
| Saved ... 199   | seventeen ... 181   | spell ... 6, 12  | study ... 194   | term ... 27, 34, 60, 63, 77, 78, 97, 98, 151, 221, 242  |
| savings ... 233   | seventy ... 40, 42  | spend ... 96, 203  | subdivide ... 55, 83, 143, 229  | terms ... 38, 39, 50, 53, 54, 58-63, 73, 78, 87, 94, 98, 104, 119, 132, 136, 148, 152-154, 158, 159, 172, ... 177, 180, 199, 218, 222, 224, 231   |
| saw ... 112, 162, 191, 196  | several ... 88, 101-103, 124, 198   | spending ... 186, 233  | subdivided ... 118  | testimony ... 22, 33, 40, 61, 66, 79, 80, 88, 89, 92, 97, 113, 115, 116, 121, 132, 133, 140, 141, 152, ... 164, 171, 179, 185, 190, 194, 195, 204, 212, 213, 221, 224, 225, 228, 232, 233 |
| scale ... 63, 185   | sewer ... 181   | spent ... 139, 217, 243, 244   | subdividing ... 170   | textual ... 61  |
| scheduled ... 44  | Shall ... 20, 145, 150, 157   | split ... 94   | subdivision ... 143-145, 151-153, 165-170, 173, 174, 222, 223, 226, 229   | theoretical ... 147   |
| school ... 12, 240  | share ... 15  | spoken ... 132   | subdivisions ... 173  | thereabouts ... 19, 93  |
| scope ... 29, 71, 72  | shared ... 134, 160   | spring ... 196, 199  | submission ... 157, 166   | therefore ... 48, 90, 135, 141, 151, 182, 187, 224  |
| scopes ... 29   | sheet ... 231   | Springvale ... 12  | submitted ... 106, 119  | thereof ... 98  |
| scoping ... 29, 30, 32, 171   | shoes ... 58, 60, 140, 152, 153, 179, 244   | squeaky ... 233  | subsequent ... 91, 248  | these ... 10, 35, 42, 43, 50, 57, 64, 78, 82, 83, 85, 89, 104, 118, 139, 141, 163, 176, 181, 188, 191, ... 192, 198, 211, 212, 214, 228, 235, 236, 247                                    |
| second ... 15, 19, 20, 36, 41, 45, 51, 55, 64, 67, 70, 75, 85, 106, 107, 121, 145, 166, 167, 191, 192, ... 235, 243   | shortly ... 87, 93  | stability ... 87   | subsequently ... 32, 165  | third ... 33, 37, 45, 83, 150, 222, 225, 235, 236, 247  |
| Secretary ... 14, 17, 20, 21  | showed ... 217  | staff ... 243, 244   | substantial ... 147, 228  | thirteen ... 180  |
| sections ... 37   | side ... 78, 83, 119, 241   | stage ... 238  | substantiated ... 239   | thirty ... 24, 186  |
| secure ... 76, 123, 243   | sides ... 64  | stake ... 242-244  | substantively ... 110   | thorough ... 194  |
| secured ... 177, 178, 184   | sidewalk ... 205, 206   | stamp ... 35, 105, 193, 219  | subtract ... 226  | thousand ... 9, 16, 56, 69, 84, 94-96, 100, 127, 129, 137, 138, 143, 145, 147, 150, 152, 177, 220, 221, ... 235-238, 240  |
| security ... 145, 150, 157  | sign ... 9, 48, 110, 245  | standing ... 63, 109, 243  | subtracted ... 84   | thousands ... 113, 119  |
| see ... 14, 15, 18, 20, 35-37, 46, 47, 51, 54, 55, 66, 82, 83, 106-109, 111, 114, 117-119, 121-125, 131, ... 138, 145, 150, 158, 160, 167, 173, 177, 210, 220, 234, 236, 245  | signature ... 6, 49, 51, 106, 137   | stands ... 100   | successful ... 193  | threatened ... 197  |
| seeing ... 28, 106, 112, 165, 213   | signed ... 45, 46, 122, 212   | stapled ... 45   | successfully ... 188  |   |
| seek ... 126  | significance ... 123  | start ... 6, 95, 131, 148, 159, 208  | suffer ... 156  |   |
| seeking ... 51, 153, 167, 229   | significant ... 117, 137, 147, 200, 216, 218  | started ... 151  | sufficient ... 117, 118, 203, 219, 232, 243   |   |
| seen ... 15, 16, 21, 35, 45, 46, 66, 154, 192, 213, 231, 241  | signing ... 140   | state ... 6-8, 12, 14, 17, 20, 21, 47, 49, 54, 79, 99, 100, 102, 104, 115, 116, 120, 123, 206, 212, 223, ... 232 | suggested ... 159   |   |
| sees ... 128  | Simmons ... 192   | statement ... 66, 82, 83, 113, 122, 174  | suggests ... 35, 103, 138, 181  |   |
| Selectmen ... 28, 37, 41, 44-47, 52-54, 81, 82, 191-193, 210-212, 241   | simple ... 161  | statements ... 51, 112, 117, 163, 167, 187, 202, 231   | suit ... 52, 155  |   |
| sell ... 55, 69, 84, 85, 88,  | simply ... 151, 188, 192, 222, 240  | stating ... 197  | sum ... 85, 102, 135  |   |
|   | single ... 87, 88, 101, 118, 246  | status ... 120, 207-209, 243   | summary ... 73  |   |
|   | sit ... 57, 81, 82, 88, 89, 91, 112, 120, 150, 151, 190, 195, 218, 219, 223, 225, 226 | statute ... 185  | summer ... 199, 206, 228, 229   |   |
|   | site ... 75, 124, 170, 196, 206, 217  | statutes ... 117   | Sun ... 127   |   |
|   | sitting ... 233   | stay ... 109   | supervisor ... 12   |   |
|   | situation ... 32, 166, 181, 248   | stayed ... 134   | supply ... 191  |   |
|   | six ... 11, 111, 113-116, 118, 121, 127, 128, 175, 176, 233, 234                      | stenographer ... 175   | Support ... 119, 121, 211   |   |
|   | Sixteen ... 181   | step ... 99  | supporting ... 87   |   |
|   | Sixty ... 123   | stepped ... 119, 152, 153  | supposed ... 93   |   |
|   | skids ... 145   | stepping ... 244   | surmised ... 134  |   |
|   | skimmed ... 86  | steps ... 58, 60, 140, 179, 207  | surprise ... 98, 204  |   |
|   | small ... 8, 9, 64, 216   | Stewart ... 202  | surprised ... 19, 20, 195, 214  |   |
|   |   | stipulations ... 6   | surrounding ... 23, 215   |   |
|   |   | stock ... 238  | survives ... 223  |   |
|   |   |  | swinging ... 205  |   |
|   |   |  | sworn ... 6   |   |

## DEPOSITION OF CRAIG MACDONNELL

MINDEX by Kenson

| Word . . . . . Page             | Word . . . . . Page             | Word . . . . . Page            | Word . . . . . Page              | Word . . . . . Page |
|---------------------------------|---------------------------------|--------------------------------|----------------------------------|---------------------|
| threatening ... 200             | 213-221, ... 223, 224,          | update ... 193                 | whole ... 29, 43, 44, 52, 61,    |                     |
| three ... 11, 18, 45, 55, 71,   | 227, 230-233,                   | upset ... 216-219              | 74, 106, 144, 187, 220           |                     |
| 74, 75, 85, 94, 95, 100,        | 235-238, 241,                   | urge ... 192                   | Wilbur ... 198, 204-206, 247     |                     |
| 119, 137, 138, 143,             | 243-248                         | usable ... 152                 | Wildlife ... 11                  |                     |
| 169, 173, 193, 212,             | traditional ... 122             | uses ... 232                   | will ... 52, 57, 63, 64, 92, 93, |                     |
| 228, 235-237...                 | trained ... 10                  | using ... 34, 62, 69, 76, 78,  | 95, 101, 102, 104, 108,          |                     |
| throw ... 233                   | transaction ... 142, 182,       | 88, 89, 98, 104, 108,          | 130-132, 139, 146,               |                     |
| Thursday ... 6                  | 183, 241                        | 214-216, 231, 242              | 152, 155-157, 160,               |                     |
| thus ... 170                    | transactional ... 29            | utilize ... 91, 110, 111, 138, | 167, 174, ... 175, 192,          |                     |
| tie ... 203                     | transfer ... 135, 154, 157,     | 142                            | 204, 205, 211, 222,              |                     |
| timbers ... 196                 | 186, 248                        | utilized ... 104, 181          | 243, 247                         |                     |
| time ... 6, 19, 23-25, 29,      | transferred ... 134, 186        | utilizing ... 113, 126, 127,   | William ... 53                   |                     |
| 32-35, 42, 43, 47, 54,          | trial ... 6                     | 133                            | willing ... 93, 94, 152          |                     |
| 60, 66, 68, 73, 76, 78,         | troubled ... 78                 | V                              | win ... 201-203                  |                     |
| 84, 85, 87, 94, 96-98,          | truly ... 158, 159              | Valerie ... 24, 25, 30         | winter ... 26                    |                     |
| 102, 103, ... 108, 110,         | Trust ... 6, 7, 14, 18, 21, 37, | validity ... 185               | wish ... 25                      |                     |
| 116-118, 123, 126,              | 45, 46, 48, 81, 113,            | value ... 147, 153, 225, 226,  | withdraw ... 119, 120            |                     |
| 127, 131-133, 140,              | 117-119, 121, 127,              | 243                            | withdrawn ... 115                |                     |
| 143, 144, 157, 160,             | 162, 192, 193, 205,             | variables ... 104, 121         | witness ... 60, 110, 131-133,    |                     |
| 167, 170, 174, ... 178,         | 208                             | variance ... 164, 166, 169,    | 136, 160, 161, 175,              |                     |
| 180-182, 185, 188,              | truthful ... 86                 | 230                            | 234                              |                     |
| 197, 199, 206, 210,             | turn ... 109, 177, 196, 206     | variances ... 151, 153,        | witnesses ... 92                 |                     |
| 213, 214, 217, 220,             | turned ... 130, 131             | 164-166, 168-170, 194,         | woman ... 87, 88, 101, 207       |                     |
| 221, 228-232, 244...            | twelve ... 180                  | 195, 228-230                   | word ... 18, 76, 81, 83,         |                     |
| times ... 44                    | Twenty ... 24, 183              | vehement ... 202               | 88-90, 102, 111, 202,            |                     |
| Timing ... 76, 77               | two ... 9, 10, 50, 51, 55, 56,  | venture ... 241, 246           | 241, 242                         |                     |
| title ... 7, 107, 173, 176, 180 | 65, 66, 68, 69, 71, 74,         | verify ... 21                  | words ... 22, 23, 28, 52, 55,    |                     |
| today ... 16, 19, 81, 88, 89,   | 76, 84, 85, 90, 91, 94,         | versus ... 164, 217, 223       | 69, 91, 114, 126, 128,           |                     |
| 91, 97, 110-113, 115,           | 117, 140, 142, 143,             | via ... 43, 122, 142           | 129, 139, 151, 155,              |                     |
| 116, 120-123, 146,              | 146, 168, ... 183, 192,         | view ... 77, 79, 98, 142, 167, | 173, 184, 186, 190,              |                     |
| 150, 151, 172, 182,             | 199, 212, 229, 234,             | 188                            | 203, 221, ... 237                |                     |
| 195, 204, ... 217-219,          | 236-239, 241, 246               | viewed ... 200, 223, 224       | work ... 6, 14, 18, 37, 61,      |                     |
| 221-223, 225, 226,              | types ... 163, 231              | vital ... 76                   | 64-66, 70, 97, 104,              |                     |
| 229, 232, 233                   | typically ... 211               | vote ... 47-49, 67, 68, 94,    | 123, 124, 128, 133,              |                     |
| Tom ... 248                     | U                               | 192                            | 135, 140, 141, 148,              |                     |
| took ... 13, 35, 44, 45, 203,   | ultimate ... 136, 139, 143      | voted ... 46-49, 64, 67, 96    | 165, 196, 211, ... 212,          |                     |
| 204, 240                        | unable ... 113, 114, 119,       | votes ... 64, 66               | 235, 236, 246                    |                     |
| top ... 154, 192                | 121, 127                        | W                              | worked ... 10, 11, 13, 89,       |                     |
| topic ... 51                    | unacceptable ... 129            | Wainwright ... 107-111, 114,   | 123, 124                         |                     |
| total ... 95, 102, 220          | unavailable ... 76, 110, 111,   | 115, 118, 120, 126,            | working ... 25, 70, 105, 122,    |                     |
| touched ... 162                 | 122, 129, 138, 142              | 127, 188, 206, 234             | 169, 186, 208, 242,              |                     |
| towards ... 143, 214            | unbridgeable ... 75             | Wait ... 116, 161              | 243                              |                     |
| Town ... 21, 25-43, 45,         | uncertain ... 167, 227          | waivers ... 167, 168           | works ... 7, 18                  |                     |
| 49-52, 54-56, 59, 61,           | unclear ... 33                  | walk ... 174, 175, 201         | worried ... 206                  |                     |
| 64, 66, 67, 69, 71-74,          | undergrad ... 12                | walked ... 201                 | worry ... 74, 89                 |                     |
| 79, 81, 84, 85, 90, 94,         | underlying ... 158              | walking ... 141                | worth ... 222, 223, 226          |                     |
| 96-98, 105-107, ... 109,        | understood ... 60, 157, 159,    | Walter ... 12                  | wrestle ... 98                   |                     |
| 111, 113, 119, 121,             | 179, 185                        | waned ... 228                  | wrestled ... 169                 |                     |
| 129-138, 143, 146-148,          | undertake ... 14, 30            | warrant ... 67                 | Wrigley ... 53, 107, 210         |                     |
| 151, 154-157, 159,              | unfair ... 188                  | warranties ... 183             | wrinkle ... 94                   |                     |
| 166, 186, ... 187, 189,         | unfamiliar ... 17               | water ... 181, 191             | write ... 122, 210, 211          |                     |
| 191, 192, 198, 207,             | unhappy ... 190, 191            | waved ... 205                  | writing ... 147, 165, 209, 246   |                     |
| 209, 210, 212, 216,             | unilaterally ... 152            | ways ... 29, 31, 142, 188      | written ... 108, 110, 192,       |                     |
| 217, 220, 224, 226,             | uninterested ... 94, 96         | weak ... 227                   | 242, 245, 246                    |                     |
| 230, 235-237, ...               | uninterrupted ... 129           | Web ... 75, 124, 206, 217      | wrote ... 59-61, 226             |                     |
| 240-248                         | Union ... 18                    | week ... 49                    | Y                                |                     |
| townspeople ... 192             | unit ... 117                    | weekly ... 232                 | year ... 19, 35, 42, 83, 87,     |                     |
| TPL ... 7, 8, 14-26, 28-31,     | units ... 100, 117, 143, 239    | weeks ... 228                  | 214, 232, 233, 244               |                     |
| 33-35, 37-40, 42, 43,           | unless ... 70, 93, 123, 130,    | Wertin ... 10                  | yearly ... 232                   |                     |
| 46-55, 57, 58, 60, 61,          | 152                             | whatsoever ... 237             | years ... 11, 19, 83, 92, 226,   |                     |
| 64-66, 69-71, 73-84,            | unlikely ... 144, 188           | whereby ... 63, 235            | 227                              |                     |
| 86, 87, ... 89-91, 96,          | unquote ... 58                  | WHEREUPON ... 16-18, 35,       | yelling ... 205                  |                     |
| 97, 99, 102-116,                | unravel ... 247                 | 45, 49, 51, 64, 75, 79,        | Yup ... 122, 219                 |                     |
| 119-127, 130, 132-136,          | unsecured ... 227, 233          | 105, 124, 137, 154,            | Z                                |                     |
| 138-143, 146, 148-159,          | unsigned ... 51                 | 164, 166, 191, 193,            | ZBA ... 167                      |                     |
| 161-163, ... 169-173,           | untenable ... 228               | 209, 212, ... 228, 234,        | zero ... 177, 233                |                     |
| 176, 178-181, 183,              | untrue ... 117, 223             | 238, 248                       | zoning ... 166-169               |                     |
| 184, 186-189, 191-193,          | unusual ... 24                  | Whitney ... 7, 8               |                                  |                     |
| 197-201, 203, 206-211,          | unwise ... 227                  |                                |                                  |                     |